REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

1817.

MICHAELMAS, 1815.,—TRINITY, 1817.

Lord ELDON, *Lord High Chancellor.*

Sir WILLIAM GRANT, *Master of the Rolls.*

Sir THOMAS PLUMER, *Vice-Chancellor,*

Sir WILLIAM GARROW, } *Attorneys-General.*
Sir SAMUEL SHEPHERD, }

Sir SAMUEL SHEPHERD, } *Solicitors-General.*
Sir ROBERT GIFFORD, }

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

57 Geo. III. 1817.

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HARRISON and Others *v.* COCKERELL and Others.

Reg. Lib. 1816. A. fo. 324.
March 14.

Although, in cases in the nature of waste, an injunction will sometimes be granted *ex parte* even after appearance, yet if, in such a case, an injunction has been obtained for default of appearance, and it turns out that an appearance had in fact been entered at the time when the injunction was moved for, the order will be discharged.

ON the 7th of *February*, an order was obtained by the plaintiffs for an injunction, until answer or further order, to restrain the defendants, *Cockerell* and *White*, (executors and trustees under the will of *R. White*, deceased,) from collecting and getting in any more of the testator's personal estate, and from selling or disposing of any part of his real estates, or receiving the purchase-money. This order was founded on an affidavit that the property, if suffered to be paid to, or remain in the hands of, the defendants, was in danger of

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of being lost; and on certificate of bill filed, and an allegation that the defendants had not appeared.

A motion was now made, on behalf of the defendants, to discharge that order, on an affidavit, denying the circumstances from which it was inferred that the property was in danger, and going on to state that an appearance had in fact been entered for the defendants on the 24th of *January* preceding.

Sir *S. Romilly*, *Bell*, and *Wray*, in support of the motion.

Sir *A. Piggott* and *Roupell*, contra.

The Lord Chancellor said, that, although in cases in the nature of waste, the Court will sometimes interfere by injunction upon an *ex parte* application, even after an appearance has been entered for the defendant, yet the fact of his having appeared must be stated; and that in the present case, if the order were allowed to stand, there would be a contradiction on the records of the Court. The order was discharged accordingly, with costs.

Rolls.
April 24.
May 6. 8.

SELBY v. SELBY.

A letter from a mother to her son, beginning "My dear *Robert*," and concluding "Your affectionate mother," not signed so as to constitute a binding agreement on the part of the mother within the intent of the Statute of Frauds.

It is not enough to identify; there must be a signing, *i. e.* either an actual signature of the name, or something intended by the writer to be equivalent to a signature; such as a mark by a marksman, &c.

THE bill was for payment of the arrears of an annuity to which the plaintiff claimed to be entitled by virtue of an agreement entered into by his mother

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(since deceased) on the occasion of his marriage; which agreement was attempted to be inferred from letters written by her to the plaintiff upon that occasion. And, on the hearing, a question was raised, whether a letter addressed to the plaintiff, beginning "My dear Robert," (which was his Christian name,) and ending with the words, "Do me the justice to believe me the most affectionate of mothers," was sufficiently signed within the meaning of the statute (*a*), although the name of the writer no where appeared in it.

Sugden, for the plaintiff.

Before the statute, it was only necessary to prove the hand-writing of the party to constitute a binding agreement; and all that the statute requires is, that there should be a signature; that the agreement, in order to be binding, "shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." It no where says that the signature so required is the signing of the name of the party sought to be bound by it. Not more is required to constitute the validity of a deed than of a will, in which case it is decided that the testator's putting his name at the commencement is equivalent to his signing it; and yet the statute expressly requires a signature. (*b*) The statute requires *signing*, not *subscribing*, and therefore the *mark* of one unable to write is a sufficient signature. It was once a question whether sealing is not signing. (*c*) A letter written in the third person, or in the name of the office and not of the individual,

(*a*) 2 Car. 2. c. 3. s. 4.

(*b*) See 1 Bro. C. C. 410. Sugd. Vend. and Purch. 76, 77. and cases cited.

(*c*) Shepp. Touchst. 60. c. 4. No. 5.

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dividual, would be a sufficient compliance with the terms of the statute. "The Lord Chancellor agrees to do so and so" would bind Lord *Eldon*,—then why not "the mother of *Robert Selby*;" and why not any other words by which the condition of the writer is clearly ascertained? The name may be printed or stamped instead of being written. The signature may be by initials only; and yet this would, in many instances, lead to the greatest uncertainty.

A letter not signed is sufficiently adopted by reference to it made in a subsequent instrument; and will, together with that instrument, constitute a sufficient agreement within the statute.

Bell for the defendant.

The words of the statute are positive, requiring nothing less than an actual signing to constitute the agreement. See *Ithell* v. *Potter*, cited in *Hawkins* v. *Holmes*.(a) It is not enough that the signature, or that which stands in the place of a signature, should identify the party. If so, the words "your affectionate mother" might be dispensed with, and proof of handwriting would be of itself sufficient. But all the cases say there must be the name of the party, or his mark in case he is incapable of writing his name, but even that mark must be identified by a subscribing witness. In *Stokes* v. *Moore* (b) the name was in the body of the instrument; and it was said, "the meaning of the statute is, that the signing should amount to an acknowledgment by the party that it is his agreement, and, if the name does not give such authenticity to the

(a) 1 P. Wms. 770, 771.

(b) 1 Cox, 219. 1 Cox's P. Wms. 771. note. And see *post. Ogilvie* v. *Foljambe*.

 instrument,

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instrument, it does not amount to what the statute requires." And speaking of the cases of wills to which it had been compared, the Lord Chief Baron observes, "that those cases have been where the instrument importing to be the final instrument of the party has been formally attested, and is in its nature complete, and the only question has been, whether the form of the statute has been complied with." (*a*) As to the case of an agreement established by reference to it made in a subsequent letter or instrument, the principle upon which it proceeds, shews that it is nothing to the present purpose. In *Coles* v. *Trecothick* (*b*) the Lord Chancellor says, "though the agreement is not signed, yet if the letter contains all the terms, and describes the consideration and all the circumstances, so that by the contents of the letter it can be connected and identified with the agreement, that letter, which not only is not a signature, but is the last of all things that can be called signing the agreement, is a writing signed; which, ascertaining the contents of the agreement, amounts to a note or memorandum of it, and therefore satisfies the statute."

Sugden, in reply.

If the mark of a marksman be considered as a sufficient compliance with the statute, it must be admitted to be in consequence of the principle for which I contend; namely, that it is enough to identify the writer, for the statute has no where said that a mark will do. A name printed or stamped has always been held sufficient, and that without any enquiry whether the party was or was not capable of writing his name.

(*a*) 1 Cox, 222, 3. And see *Walker* v. *Walker* in the Court of Delegates. Sugd. on Vend. and Pur. 77. note, and ante, Vol. I. p. 503.

(*b*) 9 Ves. 250.

The

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The MASTER *of the* ROLLS said, if he had apprehended at first, that this was the only letter applicable to the purpose of the plaintiff's demand, he should not have suffered the cause to go on; for it was impossible to hold that it could be taken to be sufficiently signed within the statute, unless it were by reference to some other instrument having a proper signature. That it is a very forced construction of the words of the statute to say that the use of the mere ordinary terms of ceremony constitutes a compliance with the regulations it prescribes. It is not enough that the party may be identified. He is required to sign. And, after you have completely identified, still the question remains, whether he has signed or not. There may be in the instrument a very sufficient description to answer the purpose of identification without a signing; that is, without the party having either put his name to it, or done some other act intended by him to be equivalent to the actual signature of the name—such as a person unable to write, making his mark. But it was never said, because you may identify the writer, therefore there is a signature within the meaning of the statute. If so, the word "I" or "me" would be enough, provided you can prove the hand-writing.

Bill dismissed.

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Rolls, May 24.

SARAH BURGESS, Widow, - - Plaintiff.

AND

HENRY ROBINSON and THOMAS BURTON, Defendants.

Devise to *R.* subject to the payment of legacies of 200*l.* each, to the testator's three nephews, to be paid as soon as the legatees should arrive in *England*, or claim the same, provided they should arrive or claim within three years; if two only should arrive or claim within the time aforesaid, each to have 250*l.*; if one only, 400*l.*; the remainder, in either case, to fall into the residue of his estate; and, if neither should arrive or claim within the time aforesaid, then 500*l.* (part thereof,) to fall into the residue of his estate. Held, the condition not performed by one of the legatees arriving in *England* and making his claim after the time specified, although ignorant till then of the will, or of the testator's death, and no advertisement for legatees.

BENJAMIN BURGESS by will, devised to the defendant *Robinson*, certain freehold and leasehold premises subject to, and charged and chargeable with the payment of 200*l.* to each of his three nephews therein named, (making together the sum of 600*l.*) "to "be paid to them respectively as soon after his (the "testator's) decease, as they or either of them should "arrive in *England* or claim the same, provided such "claims should be made within the first three years next "after his decease; and, if two only of his said nephews "should arrive in *England*, or make their claims within "the time aforesaid, each of them should be paid the "legacy or sum of 250*l.*; and if one only should arrive "in *England*, or make the claim within the time afore-"said, he should be paid 400*l.* and the residue of the "said sum of 600*l.*, in either case should be considered "and taken as part of the residue of the testator's per-"sonal estate; and if neither should arrive in *England*, "or claim, &c. within the time aforesaid, the sum of "500*l.*, part of the said three legacies, should sink into "and be taken and considered as part of his residuary "estate." And he gave the residue of his personal

estate

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estate to his wife, the plaintiff *Sarah Burgess*, and appointed the defendants executors of his will.

Upon the hearing of this cause (*a*) a reference was directed to the Master to enquire "whether the testator's three nephews mentioned in his will, or any or either of them, arrived in *England*, or claimed the legacies given to them respectively, within three years after the testator's death."

Upon this reference the Master reported that "*he* "*did not find* that the testator's nephews, or any or "either of them, did arrive in *England*, or claim the "legacies given to them respectively within three years "after the testator's death;" and then went on further to state in his report, an affidavit made by *John Scott*, identifying himself as one of the three nephews named in the will, and claiming the legacy of *400l.* as the first and only one of the nephews who had arrived in *England*, or claimed the legacy, the testator having died on the 29th of *September* 1811, and *John Scott* not having arrived in *England* till the 26th of *June* 1815, and not having claimed the legacy until some time after that period; the affidavit stating his previous ignorance of the will, and of the testator's death, together with circumstances of situation from which he inferred the impossibility of his being informed of either until shortly before the claim was made. The decree had not directed any advertisement for legatees, nor had any such advertisement ever been made.

The cause now coming on for further directions, it was insisted, on the part of *John Scott*, the claimant,

(*a*) Reported in 1 Madd. 172. See Reg. Lib. 1815. A. fo. 155.

that

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that the intention of the testator was clearly to make the legacies payable respectively as soon after the testator's death as the legatees, or either of them, should arrive in *England*, and that the limitation "within three years" ought to be confined to the case of claims being made by any of the parties while resident abroad. That the legacies vested immediately, subject only to be divested in case of no claims being made, which was a condition subsequent.

Fonblanque, in support of the claim.

Wilson, contrà.

The Master of the Rolls, however, held that the testator having arbitrarily imposed on the legatee a condition with which he had not complied; although the non-compliance was the effect of his ignorance of the provision intended; yet the consequence must be that he was not entitled to the legacy.

Decreed, the 500*l.* to be raised out of the estate, and paid to the plaintiff, with interest at 4*l.* per cent. from the end of three years after the death of the testator. Plaintiff to have her costs out of the estate. But the claimant, the nephew, was not allowed his costs.

July 15. 1817.

The 500*l.* having been invested in stock in pur-

It afterwards appearing that the 500*l.* had already been paid into Court and laid out in the purchase of stock in pursuance of an order made on the motion of the defendant *Robinson*, the cause was again spoke to on

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on the minutes, when the plaintiff claimed to be entitled to the stock, and the dividends which had accrued thereon, and likewise to interest at 4 per cent. upon the principal sum of 400*l.*, from the expiration of three years after the testator's death, to the time of the investment; the defendant, on the other side, representing that, as the money had been so paid in and invested upon his application, the plaintiff not having appeared, or consented thereto, he (the defendant) would have been liable to make good the principal sum in case of loss by the fall of stocks, and ought therefore to be held entitled to the advantage which had accrued from their rise subsequent to the investment, insisting consequently, that the stock ought to be sold, and that, out of the produce thereof, together with the dividends accrued due thereon, the plaintiff should be paid the 500*l.* with interest as aforeaid.

suance of an order made on the application of the defendant the trustee, the plaintiff, who was entitled thereto not having appeared or consented to such investment; held, nevertheless, an appropriation, and the plaintiff entitled to the stock, and all benefit accrued from the rise thereof.

But his Honour held that the investment of the money was an appropriation, by which all parties were bound; and therefore that the stock belonged to the plaintiff.

May 8. *June* 5.

MORGAN *v.* BENJAMIN and PHILIP GOODE.

Affidavit in support of injunction admitted, after answer, to prove an allegation in the bill as to acts of the parties neither admitted nor denied by the answer; but such affidavit not to be allowed in contradiction to the answer.

ON the coming in of the answer, *Agar*, for the plaintiff, moved for an injunction to restrain the defendants from proceeding in ejectment, and offered to read an affidavit made by the plaintiff and four others, in proof of an allegation in the Bill, that, before the defendants purchased the premises in question, the plaintiff had contracted with one *Westcott* for the purchase of the same, and in proof of other collateral circumstances,

from

from which an inference might be drawn that the defendants, before they became purchasers, had notice of the plaintiff's title. The case of *Taggart* v. *Hewlett* (*a*) was cited in support of this application.

Sir *S. Romilly* and *Haslewood*, for the defendants, objected to the reading of this affidavit, that there is no instance of the Court having permitted an affidavit to be received, which, in substance, contradicts the answer; and that, in the case referred to, the letters of the testator, if genuine, were binding on the defendant; whereas, in the present case, the alleged contract between the plaintiff and *Westcott* was *Res inter alios acta*, and not in any respect binding on the defendants, who, by their answer, had sworn positively that they purchased for a valuable consideration without notice of the plaintiff's title.

The LORD CHANCELLOR said that, in former instances, the Court has gone so far as to admit affidavits to be read in support of allegations made by the bill, where those allegations relate to acts of the parties, and the defendant by his answer has neither admitted nor denied the truth of them. But that it is repugnant to the whole course of practice to allow affidavits to be received in contradiction to assertions positively made by the answer. That, in the present case, he should look at the papers in order to satisfy himself how far the allegation proposed to be substantiated by affidavit had or had not been met by a denial in the answer of the defendants.

The LORD CHANCELLOR afterwards said, that it was the inclination of his opinion that the affidavit should not be admitted; but he granted the injunction on the ground of admissions made by the answer.

(*a*) Ante, Vol. I. p. 499.

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June 14.

Order to dismiss a bill, with costs to be paid by the plaintiff's solicitor, the bill having been filed without special authorityfrom the plaintiff.

A solicitor may, in the exercise of the general authority given him by his client, defend a suit, but cannot institute one without a special authority for the purpose.

WRIGHT *v.* CASTLE.

LEACH moved on the part of the plaintiff, to dismiss the bill, with costs to be paid by his (the plaintiff's) solicitor; upon an affidavit that the bill had been filed without any authority from the plaintiff. This affidavit was met by another on the part of the solicitor, stating that an action had been brought by the defendant against the plaintiff on certain promissory notes, to restrain proceedings in which action the bill was filed, although not by the express directions of the plaintiff, yet in the course of business, and by virtue of the general authority under which he acted, as the plaintiff's solicitor.

Sir *S. Romilly*, contrà.

The Lord Chancellor.

There can be no doubt as to the course of this court's jurisdiction; that, if a solicitor files a bill in the name of his client, without having authority from him for so doing, then, if the plaintiff wishes to have the bill dismissed, it will be so ordered, and the solicitor will be made to reimburse him all the expences occasioned by its having been filed. It is also settled that, if the plaintiff denies, and the solicitor asserts, authority to have been given, and there is nothing but assertion against assertion, the Court will say that the solicitor ought to have secured himself by having an authority in writing, and that, not having done so, he must abide the consequences of his neglect. There must be a special authority to institute, although a general authority is sufficient to enable the solicitor to defend a suit. In this case, the plaintiff has positively sworn that he gave no

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no authority whatever to file the bill, and this is met by only a general assertion of his being authorized, on the part of the Solicitor. The motion must therefore be granted.

ROBINSON and Others v. NEWDICK and Others. *June* 19.

Where a *caveat* has been entered against the inrolment of a decree, it stays the signing for twenty-eight days after notice given of the docket having been presented for signature: and the twenty-eight days are twenty-eight *clear* days.

In strict practice, the docket ought not to be presented until after the order to inrol *nunc pro tunc* has been obtained, and actually passed and entered.

Upon both these grounds the inrolment of a decree made under contrary circumstances was vacated, and leave given to the other party to prosecute their appeal.

THE decree pronounced at the Rolls on the 16th of *December*, 1813, was passed and entered in *Easter* Term 1815. On the 15th of *August*, 1815, a *caveat* was entered by the defendants. On the 15th of *March*, 1817, the defendants received the usual notice (dated the 14th) of the docket having been presented for signature. On the 20th of *March*, 1817, instructions were laid before counsel on the part of the defendants to prepare a petition of appeal: but, owing to the absence of the counsel from town, the petition was not prepared before the 9th of *April*. On the 11th of *April* the petition was presented; was answered on the 12th; and on the 14th notice was given to the plaintiffs of the order made upon that petition. Meanwhile, on the 12th of *April* the plaintiffs obtained the signature of the Lord Chancellor to the docket presented on the 14th of *March*, and on the same day an order was made upon their petition, to have the decree inrolled *nunc pro tunc*, of which order notice was given to the defendants on the 14th.

A motion was now made on the part of the defendants, that the order for the signing and inrolling of the decree might be discharged for irregularity, or, if the

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Court should be of opinion that the same had been regularly obtained, then that the inrolment might be vacated, and the defendants be at liberty to proceed to a hearing of their appeal upon such terms as the Court should think fit.

The affidavit in support of this application, besides the circumstances abovementioned, stated that the register's book had been searched for the order of inrolment *nunc pro tunc*, which, on the 22d of *April*, had not yet been drawn up and entered.

Sir *S. Romilly* and *Spranger*, in support of the motion.

Leach and *Bell*, contrà.

The LORD CHANCELLOR.

This is a question of great importance in point of practice—Whether the inrolment of the decree *nunc pro tunc* can prevent the lodging of this appeal? If the inrolment has been regular, this must necessarily be the case. The practice has been long established that, upon an application to inrol a decree *nunc pro tunc*, the order is made, almost as of course, provided all antecedent matters have been regularly gone through. *Harrison*, (*a*) referring to *Gilbert*, says that the order ought to be passed and entered with the register, and adds that, "though this is never done, yet a case may fall out, where it may be of fatal consequence to the party:" and, strictly speaking, it is certainly irregular to present the docket to the Lord Chancellor to be signed before the order has been so passed and entered.

(*a*) 1 Harr. Cha. 442. (8th ed.)

[His

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[His Lordship then stated the circumstances of this case.]

It is quite clear that the caveat delays the inrolment for twenty-eight days after the docket has been presented, and notice given (*a*); and, although this has given rise to some discussion, yet, upon consideration, I think the twenty-eight days must be twenty-eight clear days. In the present instance, the docket was not presented till the 14th of *March;* and notice given not till the 15th, service of which on the defendant's clerk in Court was sufficient. After this, the defendant had twenty-eight clear days to present his appeal. On the 11th of *April*, the defendant left his petition of appeal with the Lord Chancellor's secretary. Owing to some accident, it was not answered till the 12th, but this is not to prejudice; for, strictly speaking, the defendant had a right to have the petition answered as soon as it was presented; and, also, if the twenty-eight days are to be considered as clear days, the 12th was time enough. On the same 12th of *April*, the plaintiff presented his petition to have the decree inrolled *nunc pro tunc*, which was answered immediately; so that both the orders were made on the same day. But the petition of appeal was presented before the petition for inrolment. That inrolment is therefore objected to as irregular, on three grounds—*first*, that the petition of appeal, under these circumstances, had the priority—*secondly*, that the twenty-eight *clear* days were not expired before the 13th of *April*—and *thirdly*, that, in strict practice, the *docket* ought not to have been presented until after the order to enrol *nunc pro tunc* had been passed and entered. Upon all these grounds,

Service on the Clerk in Court of notice of docket having been presented for signature, is sufficient service.

Petition of appeal not being answered till the day after it has been presented, not to prejudice, the party being strictly entitled to have it answered immediately.

(*a*) *Burnet* v. *Theobald*, 1 P. Wms. 609.; and see Beames's Ord. in Chan. 309. note.

I think

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I think that the defendants are right in the present application, and that leave must be given for them to prosecute their appeal.

No costs on either side. (*a*)

(*a*) From *Lord Clarendon's Orders.* (Beames, 205.)

"That all decrees and dismissions, &c. be drawn up, signed and inrolled before the first day after the next Michaelmas or Easter term after the same shall be pronounced respectively, and not at any time after without the special leave of the Court." And see Mr. Beames's note (120), and the references.

Order 4th Dec. 1691.
(Beames, 290.)

"That all Orders, &c. which shall be pronounced and made in Michaelmas and Hilary terms, or the Vacations after, be actually entered before the first day of Michaelmas term then after; and that all, &c. which shall be pronounced, &c. in Easter and Trinity terms, or the Vacations after, be likewise entered before the first day of Easter term the next following; and that no orders, &c. that shall not be so entered, shall be afterwards entered, but by the special order of the Court first had and obtained." See Gilb. For. Rom. 163. and Mr. Beames's note (1).

Order 17th June 1698.
(Beames, 308.)

"That, where a *caveat* is entered with the proper officer to stay the signing of any decree, &c. in order to the inrolment thereof, such *caveat* be prosecuted *within a month* after the docket shall be left to be signed with the proper officer by the party that entered the same; otherwise such *caveat* to be of no force, but the docket may *forthwith* be presented as if no *caveat* entered."

Gilb. (*For. Rom.* 163.) says, the party hath 30 days from notice given of the decree being left with the Secretary of decrees for inrolment; but the other authorities referred to in Mr. *Beames*'s note on this order state that, a *caveat* will prevent the signing for 28 days from the time of the decree being presented and notice given. See note, p. 309.

JOSEPH JAMES, and HANNAH his Wife, PLAINTIFFS;

AND

WILLIAM ALLEN and Others, and THE ATTORNEY-GENERAL - - DEFENDANTS.

ROLLS, *June* 30.

Bequest in trust for such "benevolent" purposes, as the trustees in their integrity and discretion may unanimously agree on; not to be supported as a charitable legacy; the word "benevolent" not being to be restricted to the sense of "charitable" so as to authorize the Court to say that the application of the property must be confined to such objects as are, strictly speaking, objects of charity. Therefore void for uncertainty, and distributable among the next of kin.

ELIJAH WARING, by his will, after devising to his niece the plaintiff *Hannah James* for her life certain farms and lands therein described, and after her decease to her four daughters in fee, and making certain specific bequests of personal property to the said plaintiff, gave to his executors (the defendants *W. Allen*, and *J. Allen*, and *W. Matthews* deceased) 200*l.* each, in consideration of their taking upon themselves the trusts of his will, and then proceeded as follows:

"Lastly, touching all my personal property whatso- "ever and wheresoever not before disposed of, subject "to whatever expences may be incurred relative to the "execution and fulfilment of this my will, I give and "bequeath the same to my friends the aforesaid *William* "*Allen*, *Joseph Allen*, and *William Matthews*, (whom I "constitute and appoint the executors of this my will,) "and to their executors and administrators, in trust to "be by them applied and disposed of for and to such "benevolent purposes as they in their integrity and "discretion may unanimously agree on."

The plaintiffs, by their bill, prayed that the will might be established, except as to the residuary bequest, and that such residuary bequest might be declared void; charging that the disposition was void for uncertainty.

Sir *S. Romilly*, *Trower*, and *Phillimore*, for the plaintiffs, contended that this case was the same in principle

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with that of *Morice* v. *The Bishop of Durham*, (*a*) and referred to *Brown* v. *Yeall*. (*b*)

Hart and *Spence*, for the defendants, (the surviving trustees and executors,) attempted to distinguish the cases. "Benevolence" is technically a word of charity: but, when coupled with another, (as in *Morice* v. *The Bishop of Durham* with the word "liberality," (it loses its technical sense, and is to be judged of by its acceptation in common language. It was on this ground that His Honour decided in the case referred to. But, when the word stands alone, as in the present case, it is to be construed according to its technical meaning.

The Lord Chancellor, in the same case, observed that *Brown* v. *Yeall* did not apply; for that was for a particular purpose; here, if a valid devise at all, it is for general purposes.

Lovat for the representatives of the deceased trustee.

Mitford, for the Attorney-General.

The MASTER *of the* ROLLS.

I certainly did not conceive, that, in the case of *Morice* v. *The Bishop of Durham* (*c*), it was merely by the addition of the word "liberality" that the trust was rendered uncertain, and therefore incapable of being carried into execution. "Liberality" is, no doubt, distinguishable from "benevolence:" but benevolence is also distinguishable from "charity." For although many charitable institutions are very properly called "benevolent," it is impossible to say, that every object

(*a*) 9 Ves. 399.
(*b*) 7 Ves. 50. n.
(*c*) 9 Ves. 399.

of

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of a man's benevolence is also an object of his charity. Nor do I see how the required concurrence of three persons in the selection of the objects does, by any necessity, exclude the appropriation of the property to purposes very different from any that are specified in the statute of Queen *Elizabeth* (*a*), or that have been held to be within the analogies of that statute. In the case before referred to it was attempted, in the argument on the appeal, to maintain that, although the bequest should be held to be void so far as it was made for purposes of "liberality," yet it ought to be considered as good, in so far as it was for purposes of "benevolence;" which last word, it was said, was equivalent to "charity." The *Lord Chancellor* does not say, that there could not be a proportional division, where a bequest was in part only for a charitable purpose, as in the *Attorney-General* v. *Doyley* (*b*), but holds generally, that no charitable purpose was sufficiently expressed. In that case, as in this, the whole property might, consistently with the words of the will, have been applied to purposes strictly charitable.

But the question is, what authority would this Court have to say that the property must not be applied to purposes however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute. I see no substantial difference between this case and the former, and therefore consider the point as already decided; though, if it were still open, I should not entertain any doubt on the question.

(*a*) Stat. 43 Eliz.

(*b*) 4 Vin. 485. 2 Eq. Ab. 194. 7 Ves. 58. note.

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THURGAR, - - - PLAINTIFF;

AGAINST

June. MORLEY, and Others, (Part Owners of the Ship MORLEY,) and against the Commissioners of the Transport Board, - - - DEFENDANTS.

Charter-party of affreightment between the owners of the ship *M.* and the Commissioners of Transports "for and on behalf of His Majesty." During his continuance in the Transport service the ship makes a capture, which is condemned; and, upon petition to the Treasury, two-thirds of a moiety of the proceeds arising from the capture ordered by warrant from the Crown to be paid to the *owners*. These proceeds are entirely in the discretion of the Crown; and, upon motion for payment into Court of a sum admitted by the Commissioners of Transports to be due for freight under the charter-party, which motion was resisted, on the ground that the Commissioners were entitled to set off the amount of the proceeds received by the owners under the warrant; payment was ordered accordingly, without prejudice to the question of ownership.

ON the 28th of *April* 1812, a charter-party of affreightment was entered into between the defendant *Morley*, on behalf of the owners of the ship *Morley*, and the Commissioners of the Transport Board, to the effect following:— "It is covenanted, concluded, and agreed, by and between Mr. *John Morley* on behalf of, &c. of the one part, and the Commissioners for conducting His Majesty's Transport service, for and on behalf of His Majesty, of the other part, in the manner following; that is to say, The said *John Morley*, for and on behalf of himself and all and every the part-owners of the said ship or vessel, hath granted and to hire and freight letten, and by these presents doth grant and to hire and freight let, the said ship or vessel to the said Commissioners, to receive on board, at such port or ports as shall be directed, all such soldiers, &c. or whatever else shall be ordered to be put on board her, and proceed therewith to such port or ports as shall be required, and after having landed the said soldiers, &c., to receive on board such others as shall be put on board her, and proceed

therewith

therewith as shall be directed. The ship to continue in pay for six months certain, and after that, for so long time as the said commissioners shall require, and until they, or agents authorized by them, shall give notice of discharge; such notice of discharge to be given at *Deptford* or *Portsmouth*, as may be most convenient for His Majesty's service, and after the ship's arrival at one of those places. And the said commissioners for and on behalf of his Majesty, have hired or retained the said ship or vessel for the said time and service accordingly." There followed a covenant, on the part of *Morley*, that the ship should be strong, staunch, and substantial, both above water and beneath; that she should be fitted and equipped with masts, &c., and with a complement of men; and that the master should obey the orders to be from time to time received for transporting soldiers. In consideration whereof the commissioners agreed, on behalf of His Majesty, that *Morley* should be paid for the freight and hire of the ship at the rate therein mentioned.

The ship *Morley*, on entering the Transport Service, was ordered to the *East Indies*; and in *February* 1813 she captured an *American* ship called the *Rambler*, which she carried into the *Cape of Good Hope*, where the ship and cargo were condemned as lawful prize to the crown, in consequence of the ship *Morley* having no letter of marque on board at the time of the capture.

An application was afterwards made to the crown by the owners of the *Morley*, for a certain proportion of the proceeds of the prize, to be paid to them as captors, whereupon a warrant was issued from the Treasury to pay (among other things) two thirds of a moiety of those proceeds *to the owners*.

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Under this warrant, the agents for the owners received the sum of 4738*l.*, which was shortly afterwards claimed by the commissioners of the Transport Board, who sent, by their secretary, to *Morley*, on behalf of the owners, a notice that the whole amount of their share was charged against the ship as the property of that department, in whose service the ship was employed at the time the capture was made.

A suit having been instituted by some of the part owners against the others, on a question with respect to their shares, to which the commissioners of the Transport Board were made parties, to account for the freight during the time that the ship remained in their service, a motion was now made in that cause, on behalf of all the part-owners, that the defendants, the commissioners, might be ordered within a fortnight to pay into court the sum of 6000*l.*, admitted by their answer to be due from the Transport Board for freight as aforesaid.

This application was resisted by the commissioners, on the ground that they had a right to set off against the freight due the sum received by the owners on account of the capture.

Agar and *Merivale*, in support of the motion, alleging that no action at law could be maintained against the commissioners, they having expressly contracted on behalf of His Majesty (*a*), insisted that the owners of the ship, and not the Transport Board, were clearly entitled to the proportion of the proceeds of the capture granted by the king's warrant; which, if not to be claimed as matter of right, was entirely in the discretion of the crown, and had been granted by the crown expressly

(*a*) *Unwin* v. *Wolseley*, 1 T. R. 674.

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to the owners; and they cited *Fletcher* v. *Braddick*, (a) to shew that the commissioners had not the absolute, but only a particular and limited interest, in the ship, during the continuance of the charter-party, and that the owners, as they would be liable to losses, even while a king's pilot was on board, so they ought to be held entitled to any incidental advantages.

Sir *S. Romilly*, contrà, contended that the property of the commissioners, during the continuance of the charter-party, was absolute and unlimited, amounting to the temporary ownership; and cited *The Trinity House* v. *Clark*, (b) in opposition to *Fletcher* v. *Braddick*; insisting that that case proceeded entirely on the principle that, on a contract with the crown, so long as the charter-party is in force, the crown is to all intents and purposes the sole and exclusive owner.

The LORD CHANCELLOR, without hearing the reply, said that the question of ownership was foreign to the object of the present motion; for that, wherever the ownership lay, the proceeds of the capture were the undoubted property of the crown, and, as such, disposable by the crown entirely at its own discretion; and therefore ordered the 6000*l.* to be paid into Court, without prejudice to any question as to the rights of the parties.

(a) 2 New Rep. 182. (b) 4 Maule and S. 288.

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Rolls, *July* 7.

ANN FREEMAN, CAROLINE JEFCOCK, WILLIAM TRANTER, BURGES TRANTER, and JOSEPH BUTT, - Plaintiffs;

AND

WILLIAM FAIRLIE - Defendant.

Executor in *India*, having a legacy for his trouble, not entitled to commission on receipts and payments, or either, as executor; nor allowed, in passing his accounts after a series of years, to renounce his legacy, and charge commission on such receipts and payments.

HANNAH HAIGH, by her will dated the 15th of *October*, 1789, after directing her debts to be paid, devised and bequeathed all her real and personal property which she might die possessed of or entitled to as the widow and administratrix of her former husband *Samuel Oldham*, or by virtue of the settlement made on her marriage with her then husband *Richard Haigh*, to all such children as she might happen to have, his, her, and their heirs, executors, &c. in equal proportions, and in case of their death without issue before twenty-one, then she gave, devised, and bequeathed all her estates to the four first named plaintiffs in equal shares and proportions, subject to the payment of a legacy of 10,000 sicca rupees to her said husband, another legacy of 100*l.* sterling to the plaintiff *Joseph Butt*, and a legacy of 20*l.* a-piece to each of her executors therein named. By a codicil to her will she named the defendant *Fairlie* an executor jointly with others named in the will, and desired that each of her executors would accept 500 sicca rupees in lieu of the 20*l.* given them respectively by the will "as an acknowledgment for the trouble they would have in the execution of the trusts of the will," desiring that her executors would lose no time in realizing her property in such manner as they might think best for her estate, and in other respects confirmed her will.

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The testatrix's husband died in her lifetime, whereby the legacy to him of 10,000 sicca rupees became lapsed. The testatrix herself died in 1791, and the defendant alone proved the will at *Calcutta.* The bill was filed on the 30th of *June* 1812 for an account of personal estate, for payment of his legacy of 100*l.* to *Joseph Butt*, and for distribution of the residue among the other plaintiffs, who were also next of kin of the testatrix, and who were entitled under the will, the testatrix having never had any children.

The defendant put in his answer on the 31st of *October* 1812; and, on the admissions in that answer, the plaintiffs moved immediately afterwards for payment of a sum of money into court, which was on the 15th of *November* 1812 ordered by the Lord Chancellor accordingly, confining the sum to the amount of what had been so admitted. [The circumstances upon which this order was made, formed the ground of a very elaborate judgment pronounced by his Lordship, a note of which has been communicated to the reporter, and is subjoined to this statement.]

By the decree made on the hearing of the cause, dated the 17th of *March* 1813, it was referred to the master to take the usual accounts, and to enquire what interest or profit had been made by the defendant of the personal estate of the testatrix, and what balances he had from time to time had in his hands belonging thereto. The master made his report on the 3d of *February* 1816, whereby he certified (among other things) that all debts and legacies were paid, except the legacy of 500 sicca rupees given to the defendant by the codicil, which the defendant had declined accepting, claiming in his accounts a commission of 5*l.* *per cent.* as being the usual rate of allowance to executors in

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India on their receipts and payments in respect of the personal estate of their testators received and paid by them. And, with respect to the inquiry which was directed as to the profit made by the defendant out of the said personal estate, the master found various facts upon which he made the allowances which formed the ground of the second exception.

To this report exceptions were taken on the ground of the allowances made to the defendant by the master in the accounts subjoined to it by way of schedule. The exceptions were these:

" *First*, For that the said master hath in and by his " said General Report, and the second schedule to " which it refers, allowed to the said defendant by way " of discharge various sums of money amounting together to 1835 sicca rupees or thereabouts, being " equal to the sum of 229*l.* sterling, or thereabouts, " by way of commission at the rate of 5*l.* *per cent.* on " principal and interest monies received by the said " defendant on account of the personal estate of his " testatrix in the pleadings named. Whereas the " plaintiffs submit the said sums of money by way of " commission, or any of them, ought not to have been " allowed to the said defendant, in respect of such his " receipts, he the said defendant being an executor, " and his testatrix having by a codicil to her will desired her executors would each accept 500 sicca rupees " as some small acknowledgment for the trouble they " would necessarily have in the execution of the trusts " reposed in them."

" *Second*, For that the said master hath in and by " his said General Report, and the second schedule to " which it refers, allowed to the said defendant by way of " discharge,

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"discharge, various other sums of money amounting to- "gether to 2768 sicca rupees, or thereabouts, being equal "to 346*l.* sterling, or thereabouts, by way of commis- "sion, at the rate of 5 *per cent.* on sums annually cre- "dited by the said defendant, in his account as executor "for interest from time to time in his hands, and with "which interest he is charged in the first schedule to "the said report. Whereas the plaintiffs submit, the "said defendant is not entitled to, and ought not to "have been allowed, such last mentioned commission, "for the following (among other) reasons: first, because "the sums credited for interest were not in fact received "by the defendant, and invested as part of the personal "estate of the testatrix, but were, (as appears by the "two examinations of the defendant,) together with "the aforesaid principal monies, mixed with the funds "of the different mercantile houses in which the said "defendant was and is a partner, and used in their busi- "ness of merchants; and, secondly, because by virtue "of the said decree the said master is directed to in- "quire what interest or profit has been made by the "defendant of the personal estate of the said testatrix, "and what balance he had from time to time in his "hands belonging thereto, and that therefore the plain- "tiffs are advised, the said Master is not at liberty to "make to the defendant any allowance or abatement "from the interest admitted by the defendant to have "been made by him, or with which he has submitted "to be charged."

The case of *Chetham* v. *Lord Audley* (*a*) was cited, in which it was decided that an executor in *India* passing

(*a*) 4 Ves. 72. See *Robinson* v. *Pett*, 3 P.Wms. 249. that the Court never allows an executor for time and trouble, *especially* where there is an express legacy for care and pains.

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his accounts in this Court is entitled to commission upon the receipts *or* payments, according to the practice in *India*, that practice being represented in evidence to be that it was usual to make such allowance in every case in which the executor has not a legacy. And on the matter of the second exception were cited *Raphael* v. *Boehm*, (*a*) and *Bindon* v. *Burdon*. (*b*)

Sir *Samuel Romilly* and *Dowdeswell*, in support of the exceptions; and for the plaintiffs on further directions.

Hart and *Wakefield*, for the defendant.

The MASTER *of the* ROLLS allowed the exceptions, holding clearly that an executor, having such legacy for care and trouble, is not entitled to commission, and that he could not, at that distance of time, be admitted to renounce the one in order to be enabled to charge the other.

"Order, that it be referred back to the Master to review his report, and certify what (upon allowance of the exceptions) would remain due from the defendant on account of the personal estate of the testatrix.

"Declare, that the defendant was entitled to have retained and charged in his accounts the legacy of 500 sicca rupees, and referred it to the Master accordingly to take an account of what was due to the defendant for principal and interest on the said legacy.

"The Master to carry on the account from the foot of his former report, and to tax the defendant his costs as between solicitor and client; the defendant to be at liberty to retain the same out of money reported to be due from him." (*c*)

(*a*) 11 Ves. 79.
(*b*) 1 Ves. & B. 170.
(*c*) Reg. Lib. A. 1816. fo. 1309.

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Nov. 15, 1812.

[Having been favoured with the short-hand writer's notes of the judgment pronounced by the Lord Chancellor upon the motion made in this Cause for payment by the defendant into Court of the money appearing from his answer to be in his hands as executor, in which are many important observations relative to the conduct of executors, it has been thought expedient to insert it in this place.]

The LORD CHANCELLOR.

THE notice of motion in this case was, that the defendant be ordered within a month to pay into the Bank, in the name of the Accountant-General, to the credit of this cause, the sum of 30,000*l.*, in his possession as executor of *Hannah Haigh*, widow, deceased, the testatrix in the pleadings named; and also that he may in six months so lodge in the hands of his clerk in court, upon oath, all books, papers, and writings touching or relating to the matters in question in this cause in the custody or power of the said defendant, or his agents. The motion therefore had two objects; the one to bring in the 30,000*l.* alleged to be in his hands as executor of *Hannah Haigh*—the other that he might deposit in the Master's office all the papers and writings relating to the personal estate.

General rule as to payment of money into Court, is, that the plaintiffs must be solely entitled, or have such an interest jointly with others as to entitle them, on behalf of themselves and of

Now, the general rule, as to bringing money into Court, may be stated thus; that the plaintiffs are solely entitled to the fund, or have acquired in the whole of the fund such an interest together with others, as entitles them, on their own behalf, and the behalf of those others, to have the fund secured in Court. The gene-

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those others, to have the fund secured.

General rule as to the deposit of papers and writings, is, that an executor must deposit them for the benefit of the parties interested, unless there are purposes which require that he should retain them.

The question whether all the debts have been paid, not to be raised by legatees, whose legacies have been satisfied, so as to impede the parties entitled to the residue of the estate.

ral rule as to papers, and writings is, that an executor representing an estate should deposit them, for the benefit of those interested, in the office of the Master, unless there are other purposes which require that he should retain them in his own hands. The present case arises on a bill and answer which I have examined with great care, and it is impossible for any man to look at the case without feeling (at the same time that he is bound to guard against the effects of such feeling) an inclination to say that this fund ought to be necessarily forthcoming for the benefit of those ultimately entitled to it, whoever they may be. On the other hand, if the rules of practice will not authorize the Court to make the order which is prayed for, the Court must not indulge its feelings at the expence of those rules, which always aim at what is for the benefit of the suitors.

The bill states that, in *October* 1789, (now about 23 years ago,) the testatrix *Hannah Haigh* made her will, and directed that her just debts and funeral expences should be paid and satisfied. You will perceive in the answer of the defendant that a dispute is introduced, whether to this day her debts are paid or not: a dispute, with reference to which the Court would not be called upon to give much attention, if it should happen to find that those who set up that circumstance as in the way of the persons entitled to this estate, have nevertheless been paid their legacies. [His Lordship then went on to state the rest of the will and the codicil, as already stated. See before, p. 26.] Then follows this clause,—a clause which is more immediately addressed to the attention of her executors.—She desires "that her executors will lose no time in realizing her property in "such manner as they might think best for her estate, "either by public auction or private sale." After the death of the testatrix, the defendant, who carried on the business of a merchant in *Calcutta*, alone proved the will

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Legacies to executors "for care and trouble in the execution of the will" not to be paid to executors refusing to act; and payment of those legacies not to be allowed to the acting executor, though charged in his accounts.

will, the other executors having refused to interfere, although each took their legacies. The legacies to the executors so refusing are payments which cannot be allowed. The bill then alleges that the defendant, immediately after the death of the testatrix, possessed himself of the whole of her personal estate to a very considerable amount in value; and, recollecting that the will had charged him with the duty of realizing the property by an immediate sale, it goes on to state that he caused such parts of the estate as did not consist of money or securities for money to be sold, and that he received the money arising from the sale thereof, and invested the same in government and other securities, in his own name, and from time to time received the dividends and interest of such securities, as well as of all securities belonging to the testatrix at the time of her decease, and that he has long since paid the funeral and testamentary expences and debts of the testatrix. And it charges that there remained in his hands a balance of 40,000*l.* The bill then proceeds to state that applications were made by Mr. *Atkinson* to the defendant to remit the produce of the testatrix's estate to this country to be divided among the persons entitled thereto. Then (without going through the details) the bill charges the defendant much in the same terms as is usual in bills of this kind against executors. It interrogates him as to whether the testatrix's personal estate did not consist of such particulars as are therein mentioned, or of some and what other particulars. It proceeds to ask him more especially whether he did not possess himself of the whole, or what part of the testatrix's personal estate; whether the personal estate did not amount to a considerable sum, and what is become thereof. And, it is to be observed, that these questions are addressed to him at the end of twenty-one years. Whether he did not possess himself of the personal

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estate of the testatrix to some, and what amount and value? Whether he did not cause the same to be sold, and the produce to be invested in government, or what other securities, in his own name, or in whose name the same were invested? Whether he did not, and when in particular, receive some, and what dividends and interest? Whether there did not remain in his hands a considerable, and what balance? Whether such balance did not amount to 40,000*l*., or what sum in particular? Whether Mr. *Atkinson* did not frequently apply to him for some, and what account? Whether he did not require him to remit the testatrix's estate to this country for the purpose before mentioned? Whether he has not paid the several legacies to the executors, and why and for what reason he paid their legacies and not the legacies to the plaintiffs? and whether the whole, or some, and what part of the testatrix's personal estate is not vested in securities in his name and subject to his disposal? Then it requires him to set forth whether he has not from time to time, or at some and what time, lent different sums of money, part of the personal estate of the testatrix, upon some and what government securities, or other securities, in the *East Indies*, and in whose name or names, and at what rate of interest, and the dates, parties' names, and other material contents of such securities,—and whether he has not kept some money unemployed? There are several others of these interrogatories which are founded on general allegations in the charges. These are interrogatories which ought to have been answered, and it is therefore utterly impossible to represent this as a case that did not call upon an executor for such a particular account as at the end of twelve months he would have been bound to give, and at the end of twenty-one years he ought to be able to say something about. To this bill, thus ample and sufficient in its charges, an answer is put in; which

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answer does not supply me with the knowledge of the fact, at what time this gentleman, (who was an executor in *India* proving the will of this testatrix, and who in that character and no other could take into his hands the property, whether personal or real, but who could take into his hands nothing belonging to the real estate, unless he took it as an executor to this lady, and who must therefore admit himself to have received all that part of the property in his own wrong) — I say, that I cannot collect from this answer at what time he came over to this country. But this is an observation which it is impossible to say is a harsh one — that if a testatrix make a will in 1789, dying in 1791, describing in that will, by name, all her residuary legatees, as living in *England*, one would think it might have occurred to a man who had stood in the character of personal representative to such testatrix for twenty-one years, that when he was coming over to *England*, it would be necessary for him to bring some memoranda to enable him to say, "I do not know whether these houses belong to "the heir at law, or are personal estate; but, being "abroad, and having difficulties in remitting money to "*England*, I have laid out the money in such and such "securities ear-marked — there is the property, and "here are the particulars of that property, to which you "(some of you the heirs at law, and some the next of "kin,) are entitled." But, instead of that, he, this executor, who is charged by the will with the express duty, either by private or public sale, of converting the estate into money, comes over from *India*, and says, "True it is, I did, twenty-one years ago, take upon "me the character of executor — true it is, I did "deal with this estate, the particulars of which, real "and personal, I admit by accumulation to amount to "30,000*l.* sterling, nay, 40,000*l.*; but, having left my "papers in *India*, I cannot tell you any one item,

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"or any thing relating to the securities, except what is "stated in this my answer."—The answer states, "that "he believes the two houses in *Calcutta* are of a freehold "tenure,—that *Samuel Oldham* (the testatrix's hus- "band) died intestate and without issue,—that the "testatrix possessed and received the profits of the "houses during her life,—that he has heard and believes "she intermarried with *Samuel Haigh*, having first had "some settlement made upon her, whereby she reserved "to herself the power and disposition of her estates "free from the controul of her husband, and also power "to dispose of the same by will,—that he knows of no "settlement, but refers to it when produced, and leaves "the plaintiffs to make such proof thereof as they are "able—but whether the testatrix had any other au- "thority than as before mentioned to dispose of the "estate he does not know, and is not able to set forth "as to his belief or otherwise." Now this is the answer of an executor, who, twenty-one years ago, proved the will, and who is a trustee for the persons named in it. He thinks proper to put these persons, for whom he is trustee, to prove the title of the testatrix to make such will, of which he has been executor twenty-one years. Then he says, "he has heard and believes "that the testatrix, during her coverture with *Richard* "*Haigh*, being of sound and disposing mind, memory, "and understanding, duly made and published her "will and codicil; but he knows not of the execu- "tion or attestation of the said will and codicil of "his own knowledge, and leaves the plaintiffs to make "such proof as they may be able." That is to say, he takes out probate of the will twenty-one years ago, since which he has had the management of all the property; and now, at the end of twenty-one years, though his possession must necessarily be in trust, the title of the plaintiffs is disputed by him on the ground

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whether the will, which he himself has proved, is duly executed. He says, "that he alone proved the will, "and that his house of business of *Fairlie*, *Reid*, and "Co. on his account possessed themselves of the testa- "trix's personal estate, consisting of the before-men- "tioned household furniture and debts, or the produce "thereof, and of the accumulation of the rents and pro- "fits of the said two houses; but what was the amount "of the personal estate of which the testatrix was pos- "sessed in her lifetime, or at the time of her death, or "whether the same were considerable, or consisted of "the particulars in the bill mentioned, or of what other "particulars, or what was the amount or particulars of "such estate and effects of which his house possessed "themselves on behalf of the defendant as her execu- "tor, he does not know, and is unable to set forth as to "his belief or otherwise, the books and accounts relating "thereto, and which contain the account and particu- "lars of the same, having been left by him in *India* "when, in 1809, he came over to this country, where "they still remain."—So that this is an answer, (and I am bound to believe it,) which states this most monstrous proposition,—that an executor, who has been dealing with an estate amounting by accumulation to 40,000*l*. at the end of twenty-one years, cannot set forth a single particular further than is here mentioned. Then he proceeds to state, "that he does not recollect that the "testatrix was possessed of any leasehold estates"— probably they are freehold estates—"and, if he has "received the rents and profits of these houses, he has "received them in no right but as executor:" and therefore, if a question should arise between the heir at law and those who are entitled to the personal estate, that is a question which would remain to be settled. But the Court will not permit the executor to set up the title of the heir at law as between him and the personal representatives.

Executor unable to state whether houses, the rent of which he has been receiving as executor, are leasehold or freehold, not al-

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lowed to set up the title of the heir at law as between himself and the personal representatives.

representatives.—The Court would have great difficulty in saying that what he has received he has not received as executor. Then he says, "the whole of the personal estate and effects which were possessed by his "house of business on his behalf as executor of the "testatrix, and of the produce thereof, after payment "of her funeral and testamentary expenses, did not "amount to more than 2000*l.*; but, for the reasons "aforesaid, he is unable to set forth the particulars." He denies, "that the balance or surplus was considerable, or amounted to 40,000*l.*" He says "that, "since the death of the testatrix, his house of business "at *Calcutta* has received the rents and profits of the "two houses, and invested the produce of the personal "estate and effects, and of the accumulations thereof, "from time to time, in *East India* securities, in which "the same still remain invested, except only that he "has caused to be paid out of the said personal estate "the funeral and testamentary expenses, and the legacies after mentioned, and such of her debts as have "come to his knowledge, but to what amount, or whether or not all her debts due at her decease had been "paid, he (for the reason aforesaid)"—that is, that his books are left in *India*—"is unable to state, as to his "recollection or belief, save that he believes all her "debts have been paid; and he apprehends and believes that such personal estate, rents and profits, "dividends and interest, have by this time accumulated, under the management of the defendant's said "house, to about 30,000*l.*"

That the executor is uncertain whether part of the property is real or personal, and

Then he says, "that, during his residence at *Calcutta*, "applications were made to him, as executor of the "testatrix, on behalf of persons of the name of *Oldham*, "and that, since he arrived in this country, he has been "applied to by Mr. *Stephen Moore*, who produced to "him

"him a pedigree, representing *Elizabeth* the wife of "*Joseph Taylor*, heretofore *Elizabeth Oldham*, and "*Charlotte Oldham*, as the two grandchildren of *Thomas Oldham*, the eldest uncle of *Samuel Oldham*, "and (as such) "the co-heiresses at law of *Samuel* "*Oldham*; but whether they are so or not he submits "to the Court."

(if real) who are the persons entitled to it, does not afford him any ground for declining to set forth, in answer to a bill by the personal representatives, what he has done with the property.

These are matters which must remain to be decided: but they afford no ground for the defendant's not saying what he has possessed, and what he has paid, of this property.—He denies, "that he, or his house, have, at any "time after or since the decease of the testatrix, possessed "himself or themselves of the whole or any part of her "personal estate, except as before mentioned."—Now what does that mean, "except as before mentioned?" The former part of the answer admits that he had received the property, but could give no account of it.—He says, "that, at this distance of time, and for the "reasons aforesaid, he does not recollect, and cannot in "any manner set forth, whether he invested any of the "property in government or other securities, in his own "name, or in the names of any other persons, further "than that he believes such parts as were possessed by "his house of business at *Calcutta* on his behalf were in-"vested in *Indian* Government securities, either in the "name of the defendant, or of his said house, on account "of the testatrix's estate; but which in particular he "does not recollect, and cannot set forth."—Then he admits, "that his house of business has, on his account, "received the dividends and interest arising from all "such investments and securities, and also the dividends "and interest from the securities (if any) which be-"longed to the testatrix at her decease, but at what "time or times they so received the same, or to what "amount, or from or upon what securities or investments "in particular, or from whom the same were received,

"he

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"he, for reasons aforesaid, is unable to set forth as "to his recollection, belief, or otherwise."—Then he states the circumstance of his paying 500 sicca rupees to Mr. *Atkinson.*—He states his application to him to transmit the property to this country, and that, if he refused to comply, it was in consequence of adverse claims.—He states his having paid all the legacies, except the legacy to *Joseph Butt*; (and why he excepted that, I do not find any reason)—He says he has paid nothing on account of any residue;—then he goes on to state, "that, without reference to his books and accounts, he "is unable to set forth, save as aforesaid, what was the "value of the testatrix's personal estate, or whether "the same was or not more than sufficient to pay all "her testamentary and funeral expenses, or whether, on "investigation, the whole or the greater part of her "personal estate ought not to be considered as the "personal estate of *Samuel Oldham*."—Now, if it is to be considered as part of the personal estate of *Samuel Oldham*, it will be a debt to be paid in the course of administration; but, if he had stated what the property consisted of, the Court would have had no difficulty in taking every shilling out of his hands. Since he has thought proper to pay legacies, I apprehend that he must (at least for the security of the fund) stand before the Court in a situation in which the Court will not hear him allege that debts are unpaid. As to the two houses, that is a property which must be administered. He has either received it under no title at all, or under that title which makes him a trustee for the persons who have a right to claim the personal estate.—Then he goes on to say, "that he has heard and believes, (although "he does not know the same of his own knowledge,) "that the whole of such personal estate as the testa- "trix was possessed of or entitled unto at the time of "her marriage was settled as in the bill mentioned." If so, he had no right to touch one shilling of it.—Then he

Executor having paid legacies stands in a situation in which (at least for the security of the fund) it is not competent to him to allege that debts are unpaid.

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he says, "he may have stated, upon the applications "which have been made to him on behalf of the plaintiffs, that the whole amount of the property in *India*, "including the value of the two houses, by this time "will be near 40,000*l.*,"—an aggregate sum of 40,000*l.* sterling, the particulars of which, after having had his observation fixed upon them for twenty-one years, cannot be set forth till some copies or originals of the accounts are got from *India*.—He admits "that he has "not taken measures to have any part of the property "remitted to this country, and that this is in consequence "of adverse claims."—He says, "the whole remains "vested in the public securities in *India*, either in the "name of the defendant, or of his house of business, "(which in particular he cannot set forth,) but subject "to his disposal; unless some part of the produce is in "the hands of the said house at interest, which he apprehends may be the case."—It is a very extraordinary thing—it may be that this gentleman may have an apprehension that some part of this is in the hands of one of his houses of trade—but it is extraordinary, that he cannot tell us whether the fact is so.—It is unfortunate; for, if we could only have had the amount in the hands of his house, there would have been no difficulty as to so much.—Where an executor is doing what is right, it is very fit the Court should give him every indulgence; but if this executor had told us in his answer what was the money that at any time he had lent to his house, the Court would have said, You have lent this money; you have made yourself the creditor of the house; you are answerable; and the Court has nothing to do with a dealing that has not ear-marked the property. But, if the defendant cannot say how the fact is, Courts of Justice can do no more than parties enable them to do by their admissions. It is to be observed that this is an important passage in another point of view. He admits "that

Admission by an executor that the whole amount of the property is near 40,000*l*, and that the whole is invested in *India* on public securities either in his name, or in the name of the house in which he is a partner, but subject to his disposal, unless some part is in the hands of the said house at interest, which he believes may be the case, not a sufficient admission of money in his hands to order the payment into Court of any part of it.

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An executor dealing with money in his hands is bound to ear-mark it: but, if he cannot answer as to the state of it, the Court has no power to act as upon an admission.

"that there may be some part out at interest, which he "apprehends may be the case." Then he says, "that "he has not lent at any time any part of the estate, or "of the produce thereof, upon any security; the same, "and the produce thereof, having from time to time "been invested as hereinbefore in that behalf men"tioned, or interest allowed thereon."—Then follows this—in the answer of an executor, at the end of twenty-one years,—of an executor, who states that he has laid out his property in *Indian* securities in his own name, or in the name of his house:—He says, "that when "such investments were made, or at what rate of in"terest, or what particular sum or sums of money or "capital was or were purchased in such securities with "such sum of money so invested, for the reasons afore"said he is unable to set forth as to his knowledge, belief, "or otherwise."—So that, with his observation directed to his own administration of the property for twenty-one years, he cannot state the particulars of any one sum in any public security, or that he has lent to his house. With a memory so defective as to these particulars between him and those for whom he is a trustee, he stands before the Court without having aided that defective memory by bringing one scrap of paper to enable him to say where there is a shilling to administer. Then he says, "he cannot set forth whe"ther his said house of business, at any time or in any "manner, employed any sum or sums of money which "arose from the testatrix's personal estate, and were "possessed by them on his account, or the interests, "dividends, or produce of any part thereof, about their "trade or business, or in any other manner for their or "his benefit or advantage." Here he states that he cannot tell whether he has employed it for their benefit or his own; and, in a subsequent passage, he denies having made any benefit of it at all.—Then he says, "he "believes

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"believes such monies were from time to time vested in "*Indian* securities, and that, previous to such invest- "ment, while the monies were in the hands of his house, "the same, or a higher, interest was allowed there- "upon, than was payable upon the said securities; and "therefore he submits that his house was entitled to "make use of the monies on which they so paid interest, "whether they did or did not in fact make use of the "same." That will be a question to be tried when this cause comes on between him and the *cestui que trust.* Then he goes on to state, what is a very extraordinary circumstance,—"that he has no separate account of "his transactions as executor, and that all the accounts "are contained in the books" of the two or three houses he mentions. He has, therefore, as executor, done that which no executor is justified in doing; he has blended the accounts of his executorship, supposing him to have kept them, with the accounts of his commercial houses; and it now turns out, not only that he pledges himself by his answer to this,—that he cannot produce that which he ought to have,—separate accounts of his transactions with the estate to which he was to administer as executor,—but that he does not even give the plaintiffs any account, or description of the books, accounts, or papers, in which the narrative of his administration is to be found, save that it is to be found in the books of all these houses. Now I have gone through this bill and answer, for the purpose of stating the principles of the Court with respect to motions of this sort,—I mean as to paying money into Court,—and to secure myself from a hasty interpretation of what appears to be the contents of the answer, which (like all answers) must be looked at as more or less deserving of credit as they are or are not answers meeting fairly all the inquiries contained in the bill. That there are inquiries in this bill which, in nine

An answer is to be looked at as more or less deserving of credit, according as it more or

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less fairly meets all the inquiries contained in the bill.

nine hundred and ninety-nine cases out of a thousand, would have produced, on the part of an executor who had been administering a testator's estate for twenty-one years, some satisfactory information for those entitled to the property, no one, after what I have read, can deny. The Court is in the habit, and I have never broken in upon it, of looking into questions with respect to executors and trustees who have difficulties in executing their trust with an indulgence which hardly deserves that name—for it is no more than strict justice. The Court has every favourable leaning towards executors and trustees; keeping their accounts regular, and being at all times willing to inform the Court of the situation of their affairs, and the difficulties they have to meet with and encounter. I am perfectly ready to say that, where persons are living in *England*, and there is an intestacy locally situated in *India*,—where difficulties arise as to the property,—where it is doubtful whether you can safely remove property which is collecting a large interest,—and where an executor comes forward and says, "there are these circumstances of difficulty "which I have to encounter.—Here is the state of the "fund—it amounts to so much;—I have laid it out "in securities, which will be yours, for they are ear-"marked,—I have stated it in an account which has "been kept separate,—it is in a situation in which it "can never meet with accident, let what will come of "me or my concerns;"—in such a case there is not the least doubt the Court would do every thing that could be done to enable such an executor to extricate himself from his difficulties. But I must really say, and I am sorry to say it, that this is the first case in which I ever met with such an imperfect answer as this is at so distant a period. At the same time, whatever I may think of the defendant, I am bound to give credit to him:—I must believe him for the purposes of

Indulgence of the Court to executors and trustees having a difficult duty to perform, but keeping their accounts regularly, being always ready to give information as to the state of the fund, and having provided for the security of the fund, no more than strict justice, and as such to be considered.

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justice.—Then, if I must believe him, the question upon the first part of the motion is, Have I an admission that he has 30,000*l.* in his hands in which the plaintiffs are interested, solely or together with other persons, enabling me upon such admission, to order him to bring all the money into Court? I am of opinion that I cannot do it; but I think it right to say that, under all the circumstances, I can take the personal estate to have been in 1791 2000*l.*, and that I may add the accumulations to 1812; but I have not in this answer any distinct admission, that he has laid out the money in *East India* securities in such a way as to enable me to ascertain and order him to bring in what is the fair amount of the personal estate.—As to the 30,000*l.*, the greatest part must be considered as arising out of a fund to which the plaintiffs may have difficulties in primarily sustaining their right.

As to the other part of the motion, with respect to bringing the books into Court, it is a case of some novelty and difficulty; but all the difficulty is out of the question with reference to an executor. It is, and must be understood to be, the bounden duty of an executor, to keep clear and distinct accounts of the property which he himself is bound to administer; and I have not the slightest difficulty in saying that, if all these books were the books of a banking house in *London*, and an executor thought proper to put the accounts of a testator's estate into his banking books, he shall not be allowed to tell me, the *cestui que trust*, that I have no right to see his original accounts of my property. To an executor so acting I should say, they shall see every part of these original books which contain any part of this transaction. The case would be a case of greater nicety with respect to the partners of an executor who had permitted him to place in the general books his accounts as executor. I should say, upon

It is the bounden duty of an executor to keep clear and distinct accounts of the property which he is bound to administer. If, therefore, he chooses to mix the accounts with those of his own trading concerns, he cannot thereby protect himself from producing

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upon the mere fact of their having so permitted him; that this Court would not allow them to withhold a free inspection of the books; and I should say it was clearly due in a case in which an executor alleges that he may have lent to them money, part of the testator's estate, at interest, on a loan between him and them, and where the executor says they have been dealing with it by laying it out on securities. The partners are not before me; and all I can do is to order Mr. *Fairlie* to bring into Court duly attested copies of all the entries in the books and papers relating to this estate; and I add that he shall do so within six months. When I say six months, I consider at the same time that he may not be able to do it within that time. But if an executor, instead of being able at the end of twenty-one years to put in an answer which will enable the Court to say to him, Bring into Court so much money, states in his answer that the reason why he cannot give a sufficient answer is, that he administered this estate from 1791 to 1809 in *India*—that he came here in 1809—that he left behind him every paper, book and account,—and that he has no memory of the particulars and items of an estate administered under his own observation from 1791 to 1812;—I own it does appear to me to be the duty of the Court to put him under the necessity of coming to the Court from time to time to shew that he has done his utmost to supply his own defect, and that, if it is necessary to have the time enlarged, the application should be made by him for that purpose. I shall calculate what is a fair interest of the 2000*l*.

the original books, in which any part of those accounts maybe inserted.

It is a more difficult question as between an executor bound to produce and his partner in trade; but, if the partners have *permitted* him to mix the accounts, it seems they cannot afterwards object to the production.

Clearly so, in a case where the executor has admitted the having lent to the house part of the trust property, and that they have been dealing with it.

Order,—"That the defendant *William Fairlie* do "within two months from this time, pay the sum of "3680*l*. into the Bank, with the privity of the Ac- "countant-General, to the credit of this cause, to be laid "out in the purchase of Bank £3 *per cent*. annuities, "and

Executor in *India*, coming to *England*, and, after 21 years, being

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"and that the said defendant do, within six months, "produce and leave upon oath with his clerk in Court "in this cause for the inspection of the plaintiffs, their "solicitors, and agents, copies (duly attested and veri- "fied by affidavit) of all entries relating to the estate of "*Hannah Haigh* the testatrix in the pleadings men- "tioned, in all the books, papers, and writings touching "or relating to the matters in question in this cause, in "the custody or power of him the said defendant, or "his partners or agents at *Calcutta* in the *East Indies*, "or elsewhere."

called upon to account, alleging that he has left his books, &c. behind him in *India*, ordered to produce copies of all entries in such books, &c. within six months, though it is impossible he should do so, in order that the Court may have an opportunity from time to time of seeing that he has used proper diligence.

FISHER *v.* MEE. *July* 11.

Defendant having pleaded in bar to part of the relief sought by the bill, and answered as to the remainder, is not entitled to an order to put the plaintiff suing at law to his election.

A plea cannot be considered as an answer for such a purpose.

THE bill filed in *Michaelmas* term 1816, by the administrator of *Nathaniel Mason* deceased, prayed an account of the personal estate and effects of *Mason* possessed by the defendant, and of their partnership dealings, together with an injunction to restrain him from collecting any more of the partnership's effects, and a receiver.

On the 27th *May* 1817, the defendant put in a plea to such part of the bill as sought to open partnership accounts which had been settled, and an answer to the rest of the bill, setting out other accounts, upon which he admitted sums to a certain amount to be due to the plaintiff as administrator.

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In *Trinity* term the plaintiff brought an action in the King's Bench against the defendant, for part of the amount stated in the schedules to the answer.

On the 25th of *June* 1817, an order was obtained on the part of the defendant to compel the plaintiff to elect, in the usual terms of such order, *viz.* "Forasmuch as the Court is informed, &c. that the plaintiff having filed his bill in this Court against the defendant, he put in his answer thereto on the 27th of *May* last, and yet the plaintiff prosecutes the defendant at law, and in this Court, for one and the same matter, whereby he is doubly vexed: it is hereupon ordered, that the plaintiff, upon notice hereof to his clerk in Court, and attorney at law, do within eight days make his election in which Court he will proceed; and, if the plaintiff shall elect to proceed in this Court, then the plaintiff's proceedings at law are hereby stayed by injunction; but in default of such election, or if the plaintiff shall elect to proceed at law, then it is ordered that the plaintiff's bill do henceforth stand dismissed, with costs," &c. (*a*)

The plaintiff now moved to discharge that order, upon the ground of a case in *Moseley* (*b*) where a defendant having put in a plea in bar, and obtained an order for the plaintiff to make his election whether he would proceed at law or in this Court, the Lord Chancellor (*King*), upon the plaintiff's motion discharged the order; "for that the order went on a "supposition that the plaintiff had an election, and "yet the defendant pleaded he was entitled to no relief "in equity, and therefore the plaintiff was not obliged "to make his election till the plea was argued." And in

(*a*) Reg. Lib. A. 1816. fo. 1084.

(*b*) Anon. p. 304.

in that case, another was cited, of *Vaughan* v. *Welsh* (*a*), where, on a plea of the statute of limitations, an order to elect had been discharged for the like reason.

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Sir S. *Romilly*, in support of the motion to discharge the order.

Bell and *Meggison*, contrà, insisted that a plea is an answer within the scope of the rule, which is, that a plaintiff proceeding in law and in equity for the same matter shall be put to his election after the defendant has answered his bill, but not before. The plea in this case was of a stated account, and went only to part of the bill. The action was in respect of other matters which were contained in the remaining part of the bill, and to that the defendant had put in an answer.

Sir S. *Romilly*,

A plea is to be taken as an answer to no other purpose than to satisfy the terms of an order to answer. This is evident from no plea being ever ordered to stand for an answer without its being added that the plaintiff shall have liberty to except. In such a case as this, the plaintiff cannot except to the answer till the plea is disposed of;—so that, to disappoint the rule, a defendant would have only to put in an insufficient answer, upon which he might obtain the order; unless the meaning of it be that the defendant shall have first answered fully.

The LORD CHANCELLOR.

It is impossible to say that a plea and answer is an answer, within the meaning of the rule. Suppose the plea were to the whole bill—could that be an answer

(*a*) Mosely, 210.

for

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for such a purpose as this? Then, by the same reason, neither can a plea to part of the bill be so held. It is quite erroneous to say that a plea is an answer to all purposes.

[The Order discharged.] (*a*)

(*a*) Reg. Lib. 1816. A. fo. 1380.

ROLLS. *July* 24.

POWELL *v.* The ATTORNEY-GENERAL and ROBERT PENDLETON.

Bequest of residue "to the widows and children of seamen belonging to the town of *Liverpool*," held a valid charitable bequest to be applied in aid of a subsisting charity for such poor sailors' widows and children as should, in the judgment of the persons appointed to administer, be deserving objects of it.

JAMES PENDLETON, a trader on the river *Riopongos* in *Africa*, and a native of *Liverpool*, by his will dated the 10th of *July* 1802, bequeathed the residue of his estate "to the widows and children of seamen belonging to the town of *Liverpool*," and appointed the plaintiff his executor. The bill, filed against the Attorney-General, and the testator's next of kin for the directions of the Court as to the application of this residue, charged that there was no existing charitable institution for the relief of widows and children of seamen belonging to the town of *Liverpool*, but that there were almshouses in the town for widows of seamen, erected by virtue of different charitable bequests, and a hospital, under an act of 20 *Geo.* 2. *c.* 38., for the relief of maimed and disabled seamen, and the widows and children of such as should be killed, &c. in the merchants' service.

The defendant, the next of kin, by his answer, insisted that the bequest was void for uncertainty, and claimed the residue as undisposed of.

By the decree made on the hearing (*a*), it was referred to the master to inquire whether there were any and

(*a*) *July* 1809. Reg. Lib. 1808. B. fo. 1091.

what

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what charitable institutions for the benefit of the widows and children of seamen belonging to the town of *Liverpool.*

The Master by his report stated several charities for poor seamen's widows, and others for the poor of *Liverpool* generally, besides the hospital mentioned in the bill; and one under the will of *Elizabeth Cain*, dated the 8th of *June* 1778, whereby she directed the residue of her estate to be continued at interest or placed out on government securities at the discretion of her executors, and after their death, of the rectors of *Liverpool* for the time being; the interest to be paid and distributed unto and among such *poor sailors' widows and orphans, inhabitants of* Liverpool, as should in their judgment be deserving objects of charity.

The cause now coming on for further directions, *Bell* for the next of kin stated the question to be, first, whether there was a good charitable bequest, and, if so, whether it was general, or to go in aid of any of these specified charities.

Mitford, for the Attorney-General.

The MASTER *of the* ROLLS held that it was a valid bequest, and that the words were sufficiently descriptive of the last of the charities mentioned in the Master's report.

Order.—" Residue to be paid to *S. R.* and *R. H. R.* clerks, the now rectors of *Liverpool*, to be by them laid out in their names at interest, and upon their death or resignation to be transferred to their successors, rectors

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of *Liverpool* for the time being—the interest to be applied by them for the benefit of widows and children of poor seamen belonging to the port of *Liverpool*, in like manner as the proceeds of the property devised by *Eliz. Cain*, and applied according to her will." (*a*)

(*a*) Reg. Lib. 1816. B. fo. 1580.

ROLLS.
July 29, 30.

LE GRICE and Others v. FINCH and Another.

E. D. by will, reciting "that it was the wish of her mother and herself that the 500*l.* they had then out upon mortgage should be given to *S. A. G.* and her family," bequeaths "the said 500*l.*, with interest," accordingly.

The Testatrix, at the time of making her will, had a sum of 500*l.* out on mortgage, which she afterwards called in, and applied to different purposes.

The mother being dead, the Testatrix took out administration; and, upon her death, without having altered or revoked her will, the question was, Whether the legacy was adeemed; and *held* no ademption.

ELIZABETH DUNCH, by her will, dated *Oct.* 9, 1805, reciting "that it was the wish and desire "of her mother and herself that the 500*l.* they had then "out upon mortgage should be given to (the plaintiff) "*Sophia Ann Le Grice* and her family in manner therein-"after mentioned," gave and bequeathed to (the defendants) her executors, immediately after the decease of her mother, the said 500*l.*, with all interest due thereon, upon trust for the plaintiffs as therein mentioned.

The testatrix's mother died in *June* 1809, intestate, upon which her daughter the testatrix took out administration, and by virtue thereof possessed herself of her property, and died shortly afterwards without having altered her will.

The bill, praying an account of the legacy of 500*l.*, stated various circumstances, from which it appeared that

the

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the testatrix being previously to the date of her will indebted to her mother in a sum of 536*l.*, and being also entitled to 500*l.* out on mortgage, it was agreed between them that the mortgage money should be considered as the property of the mother in part of that debt, and that, after her death, the same should go to the plaintiffs, Mrs. *Le Grice* and her children; in pursuance of which agreement the will in question was made.

The answer of the executors denied all knowledge of this alleged agreement, and stated that the money so out on mortgage at the date of the will was afterwards paid off, being called in by the testatrix herself, who had applied part thereof to her own immediate purposes, and invested the remainder in stock, which had been sold by the defendants since her death, and applied in the payment of debts and legacies; the defendants insisting that this was an ademption of the legacy, being a specific legacy of money due on mortgage, and there being no property of the testatrix at the time of her death to answer that description. *Hambling* v. *Lister*, (*a*) *Fryer* v. *Morris*. (*b*)

Evidence of the agreement alleged by the bill was entered into on the part of the plaintiffs, which was objected to on the part of the defendants as not sufficient to establish the fact sought to be proved; and it was admitted that, if necessary to resort to it for the purpose of deciding the question, there must be an inquiry directed.

Sir *S. Romilly* and *Heald*; *Hart* and *Raithby*, for the plaintiffs, and for defendants in the same interest with the plaintiffs.

(*a*) Ambl. 401. (*b*) 9 Ves. 360.

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Bell and *Richards*, for the defendants the executors.

The Master *of the* Rolls, considering that an inquiry might be necessary, desired to look at the pleadings.

The Master *of the* Rolls.

I doubted at first whether it might not be necessary to direct some inquiry with respect to the interest which the mother had in this money. But on further consideration I think the question may be decided upon what appears on the face of the will itself. And, attending to the description of the thing given, it seems to me that the legacy is not adeemed by calling in the mortgage. The essential characteristic of the legacy is, that it consists of a sum, in which the testatrix admits that her mother and herself had some sort of joint interest, and which they were both desirous of giving to Mrs. *Le Grice* and her family. This characteristic was not at all dependent on the particular security on which the money might be placed. The testatrix considers the circumstance of its being at that time out on mortgage as merely accidental. She speaks of the 500*l.* "we have *now* out upon mortgage." That is descriptive of the present situation of the money. The next day it might not be out upon mortgage. But it would still be *the* 500*l.*, in which the mother and the daughter had a joint interest; and which, at the time of the will, they had out upon mortgage. The thing given is not the mortgage, but the money. It is the *said sum* of 500*l.*, that she gives to her executors. What is the *said sum?* That sum of 500*l.*, which belonged to her and her mother, and which at a given time was out upon mortgage. Whether it remained out upon mortgage at the time of the

the testatrix's death, appears to me to be a matter of indifference. That circumstance is no ingredient in the gift, either by way of condition, or of inherent description. I am, therefore, of an opinion that the legacy is due.

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July 22, 23. 25.

Agreement to purchase, established upon a correspondence referring to the terms of such agreement.

Parol evidence is admissible to explain the subject-matter of an agreement, although not to vary the terms.

Provided the name be inserted in an instrument in such a manner as to have the effect of authenticating it, the requisition of the act with respect to signature is complied with, and it does not matter in what part of the instrument the name is found.

The right to a good title does not grow out of the agreement between the parties, but is given by law; but a purchaser may waive his right by going on with the agreement after he has full notice that he is not to expect a good title. This is, in such case, matter of notice, and not of contract.

If the vendor of a leasehold interest means to sell without producing his lessor's title, he ought to declare it.

There may be waiver without any specific contract, as in cases of carriers, partners, &c.

Verbal declarations of an auctioneer at the time of sale not to be received in contradiction to the printed particulars. But *quære* as to the effect of personal information of a mistake in the particular.

Quære, Whether even a covenant against incumbrances will extend to protect a purchaser against incumbrances of which he has express notice.

THE plaintiff being possessed of the premises in question, (a leasehold house in *Grosvenor-place*), by virtue of a lease from Earl *Grosvenor* for eighty-nine years from *Lady-day* 1800, to *Thomas Bannister*, Esq. at a rent of 31*l.* 10*s.*, and of an underlease from *Bannister* to the plaintiff for eighty-six years and a quarter from *Christmas* 1802, at the same rent, subject to a mortgage for 12,000 to *Coutts*, in the month of *June* 1804, entered into a treaty for sale thereof to the defendant, which treaty having been broken off, the premises were put up to sale by auction on the 8th of the same month, and bought in for the plaintiff. The printed par-

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ticular of sale, (with a copy of which the defendant was proved to have been furnished previous to the sale taking place,) contained a full description of the premises, and of the tenure under which they were held; and one of the conditions was, "that, on the 24th of "*July* following, the vendor should execute the con- "veyance, with a good title to the estate; such title to "originate and be derived from the lease under which "the premises were held by the vendor; and the pur- "chaser should not be entitled to call for the produc- "tion of, or to inquire into, the title of the lessor."

After the auction was over, the auctioneer (according to his own statement given in evidence) waited upon the defendant, and furnished him with another copy of the printed particular, informing him that the plaintiff had lowered his price for the premises, and at the same time observing, that if he (the defendant) should purchase, it must be according to the description, and under the conditions contained in the printed particular, except as to auction duty; upon which the defendant enquired whether it would make any difference if he should write on the subject to the plaintiff or to the witness, and was informed that it would be the same thing. Subsequent to this conversation, some discussion took place between the plaintiff and defendant, in the course of which the former agreed to abate his price from 16,000*l.* (the sum first asked) to 14,000*l.*, and, the defendant having expressed a desire that the mortgage to *Coutts* should be suffered to continue on the security of the premises, the plaintiff wrote him the following letter, dated the 26th of *June*:) "Mr. *O.* has the pleasure to acquaint Mr. *F.* that "Mr. *Coutts* agrees to allow the mortgage to continue "for a year, if Mr. *F.* will be so good as to call and "promise not to exceed that time without further "arrangement.—Mr. *O.* has, by the advice of Mr. "*Hermon* (the auctioneer) reduced the price of the "house

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"house 2000*l.*, and he is confident that in a year or "two it would sell from 2000*l.* to 4000*l.* more than "he offers it at to Mr. *F.* — And, besides this ad-"vantage to Mr. *F.*, he requests him to consider, "that the rise of the funds gives a purchaser with "a year's credit an additional advantage of 20*l.* "*per cent.* At least, Mr. *O.*, after the fullest con-"sideration, and with every wish to conclude an "agreement, cannot come down lower than 14,000*l.* "for the house and fixtures of every kind, —— three "*French* plate chimney glasses, two ditto pier glasses, "with satin wood tables, &c.; but, to shew his desire "of approximation, he will request Lady *Mary's* ac-"ceptance of a pier-table of the same kind, &c. (spe-"cifying several articles of furniture) Mr. *F.* agree-"ing to take the window curtains, carpets, and furni-"ture on the principal floor by valuation. In his "instructions to Mr. *Hermon* yesterday, Mr. *O.* had "required that Mr. *F.* should enter from *Midsummer*, "allowing Mr. *O.* a month to clear. He will further "give Mr. *F.* an option to enter the 1st of *August*, "the 1st of *September*, or the 29th, Mr. *O.* paying up "interest, rent, and taxes, to the day Mr. *F.* names." To this letter the defendant returned an answer, the same day, in the following terms. "Mr. *Foljambe* "presents his compliments to Mr. *Ogilvie*, and is ex-"tremely obliged to him for his note, and for the very "liberal and accommodating terms which he has pro-"posed, and, in consequence of it, although Mr. *F.* "is still of the same opinion as to the value of Mr. *O.*'s "house, according to the times, he will not trouble "Mr. *O.* with any further discussion, *but agree to the* "*terms first proposed*—to give 14,000*l.* for the pre-"mises, including fixtures of every description, the "pier and chimney glasses, &c., Mr. *O.* to pay the "interest of the 12,000*l.* to the 29th of *September*, and "the taxes, and to have that time to remove. Lady

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"*Mary* desires particularly to thank Mr. *Ogilvie* for "his very obliging offer to her: but, as she does not "wish to take the drawing room furniture, she will not "encroach upon his liberality further than to request "to be allowed to purchase such articles of furniture, "which Mr. *O.* intends to dispose of, as may on further "consideration appear desirable. Mr. *F.* will have the "honour of calling on Mr. *O.* at half-past eleven "to-morrow, if not inconvenient to him." The arrangement with Mr. *Coutts* was afterwards completed on the terms desired by the defendant.

It was also in evidence that the defendant gave directions to *Hermon* to take measures for disposing of the house he then lived in, in consequence of his having agreed for the purchase from the plaintiff. The plaintiff's solicitors immediately afterwards prepared, by his directions, the memorandum of an agreement, upon the terms concluded on, and which ended by making the defendant expressly agree "not to require any further or other "title, or evidence of title, to the premises, than the "existing lease, and any assignment or other disposition that might have been made thereof." The plaintiff signed one part of this agreement, and sent a counterpart for the signature of the defendant, to the defendant's solicitors, to whom the plaintiff's solicitors afterwards (on the 9th of *September*) sent an abstract of the plaintiff's title, beginning with the original lease from Lord *Grosvenor*, and also copies of the abstract of Lord *Grosvenor*'s title, stating, however, in an interview between the solicitors of the respective parties on the 20th of *September*, that they did not consider the plaintiff bound to produce Lord *Grosvenor*'s title, but that, having procured copies from his Lordship's solicitors, they had sent them for the satisfaction of the defendant, and without prejudice; and subsequently, by letter, they expressly denied the obligation to do so. On the other hand,

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the defendant's solicitors objected to the agreement which had been prepared, on the ground (among others) of its containing no stipulation for the production of the lessor's title; insisting upon having such stipulation inserted; which being refused on the part of the plaintiff, the defendant declined to execute the same, and took no further steps towards the completion of the purchase.

On the 29th of *September*, which was the day for completing the contract, notice was given by the plaintiff's solicitors that the plaintiff was ready to carry the agreement into execution; and the plaintiff afterwards filed his bill for a specific performance, praying, in the alternative, that it might be declared the plaintiff was not bound to shew the title of the original lessor, or if he were, that he had shewn all that was necessary to establish a good title.

The defendant died before putting in his answer to this bill, and the suit was revived against his personal representatives, who, by their answer, contended that the treaty by private contract was wholly distinct from the conditions of sale by auction; alleging that the deceased always considered the correspondence between him and the plaintiff as mere treaty, to be reduced into an agreement, and that he never had it in contemplation to make a purchase of such magnitude without having a good and marketable title to the premises; and further submitting that, if any agreement whatever existed, it could only be derived out of the correspondence; and that, if a sufficient agreement was constituted by the correspondence, in such case the plaintiff was bound to produce his lessor's title. They denied any special agreement on the part of the deceased to take the vendor's title without such production; insisted that, if a written agreement were to be considered as so constituted, yet any conversation between the auctioneer and

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and the deceased would not be allowed to explain, add to, or vary the same; but nevertheless submitted whether or not, and how far, such letters could be considered as admitting the alleged agreement.

Sir *Arthur Piggott*, *Cooke*, and *Farrer*, for the plaintiff.

Sir *Samuel Romilly*, and *Bernal*, for the defendants.

An objection was taken on the part of the defendants to the admissibility of the evidence of the auctioneer. It was insisted that any question as to the terms of an agreement must be decided only by reference to the agreement itself;—that the evidence offered in this case was an attempt to vary the agreement by adding a term not to be found in it;—that there was not a word in the correspondence, which was said to constitute the agreement, about the conditions of sale; and that, from the very silence of the agreement respecting them, the vendor must be held to be bound to make the usual marketable title.

On the other side, it was contended that the evidence was offered, not to add to or vary the agreement, but to shew what it was that the vendor intended to sell, and that the purchaser had notice of the vendor's being able to give him.

The evidence was ordered to be read, without prejudice.

For the plaintiff.

As to the sufficiency of the agreement, by letter; *Fowle* v. *Freeman* (a), *Huddleston* v. *Briscoe* (b), *Saunderson*

(a) 9 Ves. 351. Sugd. V. & P. 71. (b) 11 Ves. 583.

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derson v. *Jackson.* (*a*) The insertion of the name in any part of a note or letter, without formal signature, is sufficient.

On the point of notice, *Daniels* v. *Davison* (*b*), *Hick* v. *Philips.* (*c*)

Whatever may be the right of a purchaser to require the production of the lessor's title, he may by his acts and conduct waive that right without any express stipulation. *White* v. *Foljambe* (*d*), *Deverell* v. *Lord Bolton.* (*e*)

The evidence in this case is only a declaration of what the vendor has to sell—not a freehold, or leasehold generally—but such an interest as Mr. *Ogilvie* himself had, and no other.

For the defendants.

First, the letter which is said to constitute the agreement on the part of Mr. *Foljambe*, amounts only to a proposition resting on treaty. Secondly, if there is an agreement, still there must be a reference to the Master as to title generally.

The material question, which is as to the production of the lessor's title, will principally depend upon the evidence of the auctioneer, and to what extent it is to be received. It cannot be received to prove even collateral matters, which are of the essence of the contract. *Rich* v. *Jackson*, (*f*) *Brodie* v. *St. Paul*, (*g*) *Clinan* v. *Cooke*,

(*a*) 2 Bos. & Pull. 238.

(*b*) 16 Ves. 249.

(*c*) Pre. Cha. 575.

(*d*) 11 Ves. 337.

(*e*) 18 Ves. 505. And see, as to the obligation to produce the lessor's title, *Fildes* v. *Hooker*, ante Vol. II. p. 424.

(*f*) 4 Bro. 514. 6 Ves. 334 note.

(*g*) 1 Ves. j. 326.

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Cooke, (*a*) *Powell* v. *Edmunds*. (*b*) If an agreement at all, this was a new agreement in substance. The letters do not refer to the conditions of sale, and the expression used by the defendant, of his agreeing "to the terms first proposed," is entirely unexplained; and, if capable of explanation, it must be by some writing signed, or otherwise not to be admitted. "It is in vain to reduce a contract to writing, if you may afterwards refer to all that has passed by parol." (*c*) If it rests doubtful whether what has passed in correspondence was only treaty, according to *Huddleston* v. *Briscoe* (*d*), and *Stratford* v. *Bosworth* (*e*), the parties must be left to law. *Daniels* v. *Davison* has no reference to this case.

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Upon the first point, I am satisfied that the letters amount to a complete agreement. The other point may deserve rather more consideration, and I shall defer giving my reasons respecting the first till I am ready to pronounce judgment on both together.

The MASTER *of the* ROLLS.

Two questions have been made in this case—first, whether there is a complete agreement between the parties,—secondly, supposing there is, whether the defendants are entitled to the usual general reference with respect to the title.

I. As to the first, the agreement, supposing it to be properly signed, is reduced to sufficient certainty by the two

(*a*) 1 Scho. & Lef. 22. 35. *O'Herlihy* v. *Hedges*, ib. 123.

(*b*) 12 East, 6.

(*c*) Per *Heath* J. in *Pickering* v. *Dowson*, 4 Taunt. 784.

(*d*) 11 Ves. 583. 591.

(*e*) 2 Ves. & B. 341.

two letters of the 26th of *June* 1814. I see nothing that remained to be adjusted between the parties—nothing that required explanation—nothing to be the subject of further treaty or correspondence. The subject matter of the agreement is left, indeed, to be ascertained by extrinsic evidence; and, for that purpose, such evidence may be received. The defendant speaks of "Mr. *Ogilvie*'s house," and agrees "to give £14,000 for *the premises*;" and parol evidence has always been admitted, in such a case, to shew to what house, and to what premises, the treaty related. In whatever sense Mr. *Foljambe* may have used the word "first," it creates no ambiguity as to his meaning; for he distinctly specifies what the terms are to which he does agree. Mr. *Ogilvie*'s further offer of throwing certain articles of ornamental furniture into the bargain seems indeed to be accompanied with the condition of Mr. *Foljambe*'s taking the carpets, &c. at a valuation. But that did not at all affect the rest of the agreement. It was merely an offer, which Mr. *Foljambe* had the option either to accept or decline; and, when he declined it, the business was left in the same state as if that additional offer had not been made. As to the mortgage, Mr. *Foljambe* appears to have rested satisfied with the information Mr. *Ogilvie* had given him as to Messrs. *Coutts*'s readiness to continue it for a year, and therefore thought it unnecessary to stipulate any thing further than that the interest should be paid to the 29th of *September*. It would be a strange objection on his part, to say, I ought not to have been so satisfied, but should have declined concluding the agreement till I had a direct assurance from Messrs. *Coutts* themselves that they would give the required indulgence.

I hardly know an instance, in which an agreement was to be collected from correspondence, where it has been

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been so clearly made out as it is in this case. It is impossible to say that, in *Huddlestone* v. *Briscoe* (a), the parties had expressed themselves in such explicit terms as are to be found in the two letters of the 26th of *June*. Yet the *Lord Chancellor* agreed with me in opinion that from the correspondence an agreement was to be collected. *Stratford* v. *Bosworth* (b) does not bear upon this case: because there was a material term in the treaty, as to which the parties had come to no agreement. The vendor proposed that all expences should be borne by the purchaser, and to that proposal the purchaser had never assented. But here, there is nothing about which the parties differ. There is no dispute, either as to the subject matter of the agreement, as to its terms, or as to the time of its completion.

Another question is, whether, taking the agreement to be sufficiently explicit in terms, it has the signature which is required by the statute. It is admitted that, provided the name be inserted in such manner as to have the effect of authenticating the instrument, the provision of the act is complied with, and it does not much signify in what part of the instrument the name is to be found. In *Stokes* v. *Moore* (c), the objection was that this authentication was wanting, the name being introduced incidentally in the middle of the paper, and referring, in grammatical construction, only to a single term in the conditions. There was no objection on the score of the Christian name being wanting; but the ground of the decision was, that the name, being introduced where it was, did not govern the entire agreement. In *White* v. *Proctor* (d), the Court of Common

(a) 11 Ves. 583.
(b) 2 Ves. & B. 341.
(c) 1 Cox, 219. 1 Cox P. W. 771. note. And see ante, p. 5. *Selby* v. *Selby*.
(d) 4 Taunt. 209.

Pleas

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Pleas held that the auctioneer's writing down "Mr. *Stokes*" in his book as the purchaser was a sufficient signature within the statute. Here, the name begins the note, and governs all that follows. I am therefore of opinion that there is in this case an agreement reduced to a certainty, with such a signature as is required by the statute.

II. As to the second question, it does not appear to me to be decided or affected by any of the cases which have been cited. In *Brodie* v. *St. Paul* (*a*), the point was, that the whole substance of the agreement must be in writing. And the agreement in that case was uncertain and incomplete, as it did not specify which of the covenants contained in another instrument were to compose a part of it. It was by parol evidence that it was to be ascertained what covenants had, and what had not, been read, and therefore the essential terms of the agreement were to be ascertained by parol evidence.

Other cases were cited to prove what is clearly established, (*viz.*) that parol evidence cannot be admitted to vary a written agreement. In *Powell* v. *Edmonds* (*b*), and in *Rich* v. *Jackson* (*c*), the parol evidence would clearly have had that effect; for, with respect to the first, an agreement to pay a certain sum for a lot of timber, without reference to the quantity, is different from an agreement to pay that sum, on condition only that a given quantity of timber was contained in the lot. In *Rich* v. *Jackson* the written agreement only expressed that a certain rent was to be paid for the lease agreed to be taken. The parol evidence would have added a stipulation that the lessee should pay the land tax. This

(*a*) 1 Ves. j. 326.
(*b*) 12 East, 6.
(*c*) 4 Bro. 514. 6 Ves. 334. note.

would,

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would, in substance, have amounted to a different agreement, being for an increased rent. But here the controversy between the parties is altogether collateral to the agreement. No term in the written agreement is sought to be varied or added to. The right to a good title is a right not growing out of the agreement between the parties, but which is given by law The defendant insists on having a good title, not because it is stipulated for by the agreement, but on the general right of a purchaser to require it; and the answer is, he has waived it, having chosen to go on with and conclude the agreement after he had full notice that he was not to expect it. I take this to be matter of notice, and not of contract; and so the *Lord Chancellor* treats it in *White* v *Foljambe* (*a*) and *Deverell* v. *Lord Bolton* (*b*). He says that, if a vendor of a leasehold interest means to sell without production of his lessor's title, he ought to declare it. Here, Mr *Ogilvie* has declared that his landlord's title is not to be produced; and is he to be left in the same situation as if he had been wholly silent on the subject? If he had given no notice, all that the defendants would have been entitled to would be a reference as to title; and that is what they require, now that notice has been given. This would therefore be to exclude the effect of notice, and of the distinction made by those decisions, altogether.

Now, it is impossible to have more precise and definite notice than that which has been given to Mr *Foljambe*. Not only is the particular of sale before him at the time of the auction; but, after the auction, a second copy of the particular is delivered to him, accompanied with an express intimation that he is to treat upon the footing of the terms therein contained. It is

(*a*) 11 Ves. 337.
(*b*) 18 Ves. 505. And see *Fildes* v. *Hooker*, ub. sup.

matter

matter of every day's practice that a party may, by his acts and conduct, waive a right which he possesses, and that this may be done without its being reduced to the shape of a specific contract. The exemption of common carriers from their legal liability is effected by notice, without any express contract. So also the authority of one partner to bind another may be limited by notice, as in *Lord Gallway* v. *Matthew*. (a) And the notice itself needs not to be in writing. In *Gunnis* v. *Erhart* (b), where the Court of Common Pleas determined—and which determination has been very properly adhered to ever since—that the verbal declarations of an auctioneer at the time of sale shall not be received as evidence to contradict the printed particulars, the Court did not determine that there might not be room for the admission of such evidence where the purchaser has personal information given him of a mistake in the particulars. (c) An incumbrance is, *pro tanto*, a defect of title. But, suppose the letters which constitute this agreement had taken no notice of the ground-rent, it would be quite impossible to maintain that Mr. *Foljambe* was to have been indemnified against that incumbrance, when it was expressly stated in the printed particulars. Even in cases where there has been a covenant against incumbances, it has been sometimes doubted whether that covenant would extend to protect a purchaser against incumbrances of which he had express notice. Suppose Mr. *Ogilvie* had stated in his particular that he would produce his lessor's title, and the agreement itself had been silent with respect to it, could he have been allowed to agitate the question as to the obligation of the vendor of a lease to produce the lessor's title? I apprehend, he would not. He would have been bound by the repre-

(a) 10 East, 264.

(b) 1 H. Black. 289.

(c) See Sugd. Vend. and Purch. 107. fifth ed.

sentation,

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sensation, on the footing of which the treaty proceeded. Why is the purchaser to claim against that representation which is made to him, and on the footing of which he is contented to treat? It is to be presumed that he considers, in the price, the difference between the one kind of title and the other.

I am, therefore, of opinion that, although the defendants have a right to see whether Mr. *Ogilvie* himself has a title, the reference ought to exclude any inquiry into the title of the lessor.

Declare, That the agreement contained in the letters, bearing date respectively the 26th of *June* 1814, ought to be specifically performed and carried into execution, and the plaintiff not to be required to produce the title of the lessor (the Earl of *Grosvenor*) and his trustees to grant the indenture of lease in the pleadings mentioned.

Refer, &c. to enquire whether the plaintiff can make a good title to the premises, to be derived under the said lease, and the Master to state his opinion thereon.

Reserve further directions, &c.

Reg. Lib. 1816. B. fo. 1786.

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ROLLS. *July* 1, 21.

JOHN LOCKMAN POTINGER, SARAH FRANCES POTINGER, and HARRIET ANN POTINGER, Infants, by RICHARD POTINGER, their next Friend, - PLAINTIFFS;

ROBERT WIGHTMAN and HARRIET his Wife (late HARRIET POTINGER, Widow,) WILLIAM BROCK, BENJAMIN LE MESURIER, RICHARD POTINGER, MARIA POTINGER, WILLIAM POTINGER and ZELIA POTINGER, Infants, by IRVING BROCK their Guardian, WILLIAM DE JERSEY, and DANIEL DE LISLE BROCK, out of the Jurisdiction of the Court, JOHN THOMAS, SAMUEL DUBREE, MOSES DAVID GETTING, NEWMAN SMITH, and JOHN POINGDESTRE, - - - - DEFENDANTS.

T. P. a native of *England*, domiciled in *Guernsey*, dies intestate, leaving a widow, and infant children by her, and also by a former wife. The widow, after his death, is appointed guardian of the children by the Royal Court of *Guernsey*, and in conjunction with another person, who is appointed guardian of the children by the former marriage, sells the property of the intestate and invests the produce in the *English* funds, after which she comes to *England* with her children, and is domiciled there. On the death of some of the children under age, a question arises, whether their shares of the property have become distributable according to the law of *England*, or of *Guernsey;* and it was held that the law of *England* is to govern the succession, the domicil of the children being (according to the opinion of foreign jurists, our own law being silent on the subject,) to follow the domicil of the surviving mother, where no fraudulent intention can be imputed. But fraud may be presumed, where no reasonable cause appears for the removal.

IN *December* 1805, *Thomas Potinger*, a native of *England*, died in *Guernsey*, the place of his domicil, intestate, leaving seven children living at his decease—four by a former wife, (the four infant defendants,) and

 three,

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three, (namely, *John Lockman Potinger*, *Sarah Frances Potinger*, the infant plaintiffs, and *Henry James Potinger*, deceased before the filing of the bill,) by his widow the defendant *Harriet Wightman*, who was then pregnant of a fourth child, afterwards born, the plaintiff, *Harriet Ann Potinger*.

Shortly after the decease of the intestate the Royal Court in *Guernsey*, on the nomination of the nearest relatives of the children, appointed the defendant *Daniel De Lisle Brock* guardian for the children of the first marriage, and the widow guardian for her own children;—and, by permission of the Royal Court, *Daniel De Lisle Brock*, and the widow, in their character of guardians, sold the real and personal estate of the intestate in the island of *Guernsey*, and vested the produce in the *English* funds.

In *September* 1806, the widow quitted the island of *Guernsey*, and came to *England*, bringing with her her four infant children, and from that time established her domicil in *England*. In *May* 1809, *Henry James Potinger* died at the age of six years; and in *April* 1812, *John Lockman Potinger* died at the age of ten years.

The bill prayed the usual accounts of the real and personal estate of the intestate. The decree directed an inquiry "Whether the intestate was domiciled in the island of *Guernsey*, and, if the Master should find that he was domiciled there at the time of his death, he was to inquire and state who was, or were, his heir or heirs at law at the time of his death, and what was the law of the island with respect to real and personal estates, and who was, or were, and are, according to the law of the said island, entitled to the intestate's real and personal estate therein, and in what shares and proportions."

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Law of *Guernsey* as to the descent of real estate, and the distribution of personal estate, of persons dying intestate.

By his report, dated 8th *April*, 1816, the Master stated that the intestate was domiciled in *Guernsey* at the time of his death; and he also stated the law of *Guernsey* respecting the descent of the real estate, and the distribution of the personal estate, of persons dying intestate there, as follows:—" When a man, a native of " *England*, dies intestate in the said island, seised and " possessed of real and personal estate there and in " *England*, leaving a widow, and sons and daughters " by a former wife, and sons and daughters by his sur- " viving widow, who was at his death ensient with " child, (which was in due time after his death born " alive,) the widow of such intestate is entitled to " dower, which is the possession, use and enjoyment, " during her life, of one third part of the real estate " which her said deceased husband was seised and pos- " sessed of at the time of his death in the said island of " *Guernsey*, unless by some stipulation in the marriage " contract it should have been provided otherwise. " One third part of the personal estate becomes the " widow's property, and no real estate in *Guernsey* " can be devised by will. The real estate in that " island is divided after the death of the owner in the " following manner, *viz.* one-twentieth part of the land " (the buildings thereon included) belongs to the sons, " and is taken where the eldest son, purposely, for him " and his brothers, places a stake; out of which he is " allowed for his eldership according to the quantity " of land, or value of the same, *viz.* from 16 to 22 " perches of ground adjoining the spot where he has " fixed the stake. The rest of the said 20th part, if " any, is divided between him and his brothers in equal " portions, and the remaining nineteen-twentieths of " the land are divided as follows:—two-thirds to the " eldest son, and his brothers, in equal portions, and " the other third part for the sisters, to be divided " equally

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" equally between them. But, if the sons are more " in number than the daughters, and, by claiming one-" third of the whole real estate, the sisters would have " each more than each of their brothers, the brothers " may require that the real estate should be equally " divided between all the children, the brothers giving " up their claim to the said twentieth part, (the elder-" ship, which the eldest son is always entitled to, ex-" cepted,) to which they would otherwise have been " entitled; but the whole to be subject to the widow's " dower as aforesaid. After the widow has taken one-" third out of the personal estate, the elder son is al-" lowed, for his eldership, one-seventh, or at most one-" sixth part, of the remaining two-thirds, so far as the " same consists of household furniture, plate, jewels " and linen, or what is called *mewbles*, *mewblons*; and " all the remainder of the personal estate is divided be-" tween him, his brothers and sisters, in equal portions. " In case any or either of the sons or daughters of such " deceased person should die without issue, and unmar-" ried, the real estate, to which such children, so dying, " were entitled at their respective deaths in the island, " becomes distributable in equal portions between all " the surviving brothers, exclusively of the sisters, with-" out distinction, whether they be of the first or last " wife; and a similar distribution of their personal " estate, if they be domiciled in the island, takes place " between the brothers, exclusively of the sisters, also " without distinction, whether they be of the first or " second marriage; but, if such child or children, " whether they be of the first or second marriage, " should have acquired a settlement, and be domiciled " out of the island, the division of their personal estate " should be made in conformity to the laws where " such child or children had acquired a settlement, and " were domiciled."

After

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After ascertaining the original shares of the respective parties in the intestate's personal estate, the Master proceeded to certify that, in consequence of the death of *John Lockman Potinger*, and *Henry James Potinger*, their shares in the intestate's personal estate were become divisible in equal shares between their surviving brothers, the defendants, *Richard Potinger* and *William Potinger*.

When the cause came on for farther directions, this conclusion was controverted; and it was contended, on the part of the widow and the daughters, that the shares of the deceased children were distributable by the law of *England*. It being admitted that personal property is regulated by the domicil of the proprietor, the question was, whether the deceased children retained their paternal domicil in *Guernsey*, or acquired a new derivative domicil from their mother in *England*.

By an order dated 26th *July* 1816, it was referred back to the Master to report the domicil of the children at the time of their death, with liberty to state any special circumstances.—By his report, dated 8th *March* 1817, the Master found that the children, at the time of their death, were domiciled in *England*. The cause coming on again for farther directions, the question was argued.

Bell and *Heald* (for the defendants *Richard Potinger* and *William Potinger*, the surviving brothers,) argued, against the Master's report, that there had been no change of domicil. The question had never been positively decided, and there was no law in the island of *Guernsey* applicable to the case. By the law of *England*, it was a question of intention. An infant was incapable of exercising any intention—and to give such a

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power to a guardian, would be to invest him with an authority greater than the law, in other instances, denies—such as, an authority to change the nature of the infant's property. It would, besides, be holding out a temptation to fraud.

Sir S. *Romilly*, and *Swanston*, for the plaintiffs.

The proposition which we maintain is, that the domicil of the widow, combining (during her widowhood) the characters of guardian and head of the family, is communicated to her minor children.

The power to transfer the domicil of the minor is inherent in the guardian. It is absurd to suppose that the law appointing him to protect the interests of the minor, omits to invest him with powers adapted to afford that protection—nor can it be denied that the interests of the minor may in many events be promoted by the transfer, or prejudiced by the permanence of his domicil.

This case affords an example of a most important benefit consequential on the transfer,—the acquisition of a power of disposition over personal estate.—By the law of *Guernsey*, the children could not dispose of their property, either real or personal, during their minority.—By the law of *England*, they are competent to dispose of their personal property by will, at the age of fourteen. (*Co. Litt.* 89. *Harg. Note* 6.) The transfer of the domicil therefore, gave to them, at that age, the absolute interest in property, of which they were before only tenants for life; an advantage so substantial that it has frequently been assigned by Courts of Equity, as a reason for permitting the conversion of the real estate of an infant into personalty, and prohibiting the converse,

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converse, *Pierson* v. *Shore* (*a*), *Earl of Winchelsea* v. *Norcliffe* (*b*), *Thomas* v. *Hewitt*. (*c*)

It would not be difficult to suggest cases of ordinary occurrence, in which, without a power in the guardian to transfer the domicil of the minor, a *British* subject resident in *England* must continue, during his minority, immutably domiciled in a hostile territory.

Upon principle, therefore, the guardian is competent to transfer the domicil of the minor: but, at least, it seems impossible to deny that power to the *widow*, who, succeeding on the death of her husband to the station of head of the family, combines that character with the character of guardian. To deny her power, is to affirm the general proposition, that after the death of the father, the domicil of the minor, however much his interests may require a change, remains immutable during his minority.

Of authority on this subject, in the *English* law, none exists—The *dictum* of Lord *Alvanley*, that a minor cannot, during his state of pupillage, acquire a domicil of his own, (*Somerville* v. *Somerville* (*d*),) obviously refers to a domicil, acquired, according to the expression of *Bynkershock*, "*proprio marte*," by the minor's own acts: but it has been much discussed by foreign jurists, to whose opinions (in the absence of domestic authorities) our Courts are accustomed to resort, on questions which (like the present,) must be decided rather by general principles of law, than by the peculiar doctrines of any local code.

(*a*) 1 Atk. 480.
(*b*) 1 Vern. 437.
(*c*) 2 Ves. j. 264.
(*d*) 5 Ves. 787.

Voet

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Voet (*a*) maintains the right of the surviving parent, whether father or mother, to transfer the domicil of the minor; with the exception of cases, in which the transfer is made, not for the benefit of the minor, but in contemplation of his death, and with the purpose of securing a larger share in the succession. In such cases, the attempt to transfer the domicil is fraudulent, and therefore ineffectual: but, in order to raise the presumption of fraud, two circumstances must concur; a change of domicil to a place, the law of succession of which is more favourable to the surviving parent than the law of the place of original domicil; and indisposition of the minor at the time of the change.

Rodenberg (*b*), in substance, agrees with *Voet*.

(*a*) Comm. ad Pand. Lib. 5. tit. 1. s. 100. The case put by *Voet* in the passage referred to explains clearly the nature of the fraud intended.

"Quid enim, si pater materve ex eâ *Hollandiæ* parte quæ jure *Scabinico* regitur, et in quâ, soluto per mortem conjugis matrimonio, superstes liberis nequit ab intestato hæres esse, in alteram ejusdem *Hollandiæ* partem, quæ jure *Æsdomico*, parentem superstitem ad luctuosam filii hæreditatem vocante, utitur, domicilium transtulerit, quod impuberem languentem videt, ac propediem turbato mortalitatis ordine sibi orbitatem superventuram veretur, quo possit ex novi domicilii jure impuberi succedere?" — But he goes on afterwards to say, "*Contrà*, si nulla talis hæreditatis aut alterius commodi, cum tertii detrimento captandi, ratio appareat; *si cum parente justam aut probabilem causam migrandi habente, liberi sani vegetique migrent*; &c. nihil impedimento est, quo minus talis migratio parentis superstitis, bonâ fide facta, etiam ad domicilii pupillaris translationem efficax foret, etiamsi deinde ipsis sine testamento decedentibus parens superstes ex novi domicilii jure hæres sit," &c.

(*b*) De Jure Conj. Tit. 2. cap. 1. s. 6. cap. 2. s. 2, 3.

Bynkershoek,

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Bynkershoek, who devotes a whole chapter to the discussion of this particular question (*a*), ascribes to the

(*a*) Quest. Jur. Priv. Lib. 1. c. 16. The Chapter is thus entitled.

" De domicilio impuberis vel minoris, et an superstes parens vel tutor id mutare posset, et quo effectu circa successionem ab intestato ?"

And he puts a case which came under his cognizance as a member of the Supreme Council of *Holland*, and which appears decisive of the present question.

" Pater *Amsterdammensis* et matrem et *Titium* qui Amsterdami habitabat, liberis suis tutores dedit. Mater eademque vidua, mense Maj. 1714, cum liberis quinque, quos penes se habebat, *Amsterdamo* abit, et *Leidam* domicilium transfert, ut minori sumptu ibi se suosque exhiberet, nihil quicquam contradicente tutore *Amsterdammensi*. Mense Nov. ejusd. anni, *Titia* (quæ erat ex quinque liberis) *Amsterdamum* redit, et ibi educanda traditur Matronæ cuidam in scholâ puellari. Mense Aug. 1773, illa *Titia*, *Leidam* reversa, moliebatur nuptias cum *Mævio*. Cum Mater dissentiret, a *Titiâ* et *Mævio* vocatur ad magistratum *Leidensem*, ut redderet dissensus sui rationes. Superveniunt magistri pupillares, qui *Amsterdami* sunt, et contendunt illas rationes apud se esse reddendas;—*Titiam* enim minorem nunquam domicilium mutâsse. Cum ea res unice penderet a mutatione domicilii, placuit partibus de illâ prætermissis aliis judicibus, statim litigare apud Senatum Supremum. Senatus nihil verius esse putavit, quam viduam, quinque liberorum matrem, eandemque tutricem, potuisse, quo vellet, domicilium transferre, et reverà cum *Titiâ* minore, et reliquis fratribus et sororibus transtulisse *Leidam*, ubi simul adhuc habitabant. Patris domicilium morte extinctum erat, et mater, nunc sui juris, parsimoniæ consulens, cum liberis suis *Leidæ* edere, quam *Amsterdami* esurire, maluit. Quod autem *Titia*, ad scholam puellarem frequentandam, novem fere menses *Amsterdami* morata fuerit, eo ipso domicilium mutâsse nemo facile dixerit, et contra quoque responsum est. Atque ita Senatus, 21 Jul. 1716, judicavit *Titiam Leidæ* habitare, et ibi, si vellet, matrem posse matrimonio contradicere."

surviving

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surviving parent an absolute power of transferring the domicil of the minor; and he objects to the exception of cases of fraud, assigning as the ground of his objection, the difficulty of ascertaining the intention of the parent, and of defining the requisite degree of indisposition in the minor.

The *French* law on this subject, as it is to be collected from *Denisart* (a), appears involved in some degree of confusion: but *Pothier*, who discusses the question at length (b), though he differs from other jurists in denying to the *guardian*, explicitly agrees with them in

Bynkershoek afterwards states the case put by *Voet* and *Rodenburg;* and discountenances, even so far as to ridicule, the distinction made by them of a *fraudulent* change of domicil, as to its authorizing an inquiry *quo animo* the change was effected.

(a) Voce *Domicile*, s. 9. 14. 37.

(b) Coûtumes d'*Orleans*, p. 6. 8.

Introd. Générale. Chap. 1. s. 1. No. 16—20.

After denying to the tutor or guardian the power of changing the domicil of his ward or pupil, this writer goes on to say as to the surviving mother.

" Il n'en est pas de même de la mere: la puissance paternelle étant, dans notre droit, (différent en cela du droit Romain,) commune au pere et à la mere: la mere, apres la mort de son mari, succede aux droits et à la qualité de chef de la famille qu'avoit son mari vis-à-vis de leurs enfans: son domicile, *quelque part qu'elle juge de le transférer sans fraude*, doit donc etre celui de ses enfans, jusqu' à ce qu'ils aient pu s'en choisir un qui leur soit propre.

Il y auroit fraude, s'il ne paroisoit aucune raison de sa translation de domicile que celle de procurer des avantages dans les successions mobiliaires de ses enfans.

Les enfans suivent le domicile que leur mere s'établit, sans fraude, lorsque ce domicile lui est propre, et que, demeurant en viduité, elle conserve la qualité de chef de famille."

ascribing

nscribing to the *surviving parent*, the power of transferring the minor's domicil. By the *Code Napoleon* (*a*) it is declared that the minor, not emancipated, has his domicil at that of his father and mother or guardian; a proposition which would not be true unless the domicil of the minor changed with the domicil of his parent or guardian.

The passage in *Mornac*, (*b*) to which *Bynkershoek* and *Pothier* refer, contains an examination of the question, whether, after the death of both parents, the guardian possesses the power of transferring the domicil of the minor. That question he represents as undecided, himself supporting the negative. The power of the surviving parent is not discussed.

In a collection of continental jurisprudence, (decisiones celeberrimi Sequanorum Senatus Dolani, authore *Joanne Grivello*, Sequano (*c*);) a case is reported, which involved this question. Throughout the argument, (and the case appears to have been elaborately argued,) it was assumed on one side, and admitted on the other, that the widow is competent to transfer the domicil of her minor children. The decision, proceeding on another ground, left that question untouched.

Upon principle and authority, therefore, it seems clear that the widow is competent to transfer the domicil of her children during their minority.

The only objection opposed to this conclusion is, that by the transfer of the domicil in the event of the minor's death, the rights of his representatives are varied.

(*a*) Code Civ. Liv. 1. tit. 3. art. 108.

(*b*) Obs. in Cod. lib. 3. tit. 20. p. 129.

(*c*) Dec. 11. p. 21. 24.

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In reply to this objection, it is sufficient to recur to the principle, that the office of guardian is instituted for the benefit of the minor. The conduct of the widow, acting in the characters of guardian and head of the family, is to be regulated by the interests of those whom she is appointed to protect. To contend that an act performed, *bonâ fide*, for the benefit of the children, may be impeached, because it happens to affect the heir, or next of kin, is to maintain the absurdity, that the rights of the representatives control the rights of the proprietor.

In the instances of infancy and lunacy, this Court has repeatedly directed, or confirmed, acts beneficial to the interests of the infant or lunatic, but prejudicial to one class of his representatives. *Vernon* v. *Vernon*, (a) *Pierson* v. *Shore*, (b) *Jerwood* v. *Twyne*, (c) *Oxenden* v. *Lord Compton*. (d)

The conclusion at which we thus arrive, on principle, and the authority of foreign jurists, is confirmed by the analogy of a series of decisions in our own Courts.

Under the system of poor laws established in this country, if a widow removes with her infant children, and acquires a new settlement, that settlement is communicated to them, and supersedes their original paternal settlement (*Inhabitants of Woodend* v. *Inhabitants of Paulspury*, (e) *Rex* v. *Inhabitants of Barton Turfe*, (f) *Rex* v. *Inhabitants of Oulton*. (g)

(a) Cited in Ex p. *Bromfield*, 3 Bro. C. C. 513.

(b) 1 Atk. 480.

(c) Amb. 417.

(d) 2 Ves. 69. But see *Ware* v. *Polhill*, 11 Ves. 278.

(e) Raym. 1473. Stra. 746. S. C.

(f) Burr. Sett. Ca. 49.

(g) Burr. Sett. Ca. 64.

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This doctrine is founded, not on positive statute, but on general principles of law. (See *Woodeson's Lectures*, p. 278, 279., and The History of the Law of Settlements, in 1 *Nolan's Poor Laws*, 236. and seq. to 276.) The statute determines the settlement of the parent, but the conclusion that the settlement of the parent is communicated to the children, is deduced from a course of reasoning precisely analogous to that by which the foreign jurists establish the like conclusion in the law of domicil. In effect, therefore, these decisions amount to a recognition of the reasoning from which that doctrine is a necessary inference; and in words they declare, that by the *English* law, the widow, on the death of her husband, becomes the head of the family.

Hart, *Shadwell*, and *Girdlestone*, for defendants in the same interest.

The MASTER *of the* ROLLS.

On the subject of domicil, there is so little to be found in our own law that we are obliged to resort to the writings of foreign jurists for the decision of most of the questions that arise concerning it. The *dictum* of Lord *Alvanley* in *Somerville* v. *Somerville* (a) has no relation to the point now in dispute. He is speaking of the power of a minor to acquire a domicil by his own acts. Here the question is, whether, after the death of the father, children remaining under the care of the mother, follow the domicil which she may acquire, or retain that which their father had at his death, until they are capable of gaining one by acts of their own. The weight of authority is certainly in favour of the former proposition. It has the sanction both of *Voet* and *Bynkershoek*; the former however qualifying it by

(a) 5 Ves. 787.

a condition

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a condition that the domicil shall not have been changed for the fraudulent purpose of obtaining an advantage by altering the rule of succession. *Pothier*, whose authority is equal to that of either, maintains the proposition as thus qualified. There is an introductory chapter to his Treatise on the Custom of *Orleans*, in which he considers several points that are common to all the customs of *France*, and, among others, the law of domicil. He holds in opposition to the opinion of some Jurists, that a tutor cannot change the domicil of his pupil, but he considers it as clear that the domicil of the surviving mother is also the domicil of the children, provided it be not with a fraudulent view to their succession that she shifts the place of her abode. And he says, that such fraud would be presumed, if no reasonable motive could be assigned for the change.

There never was a case in which there could be less suspicion of fraud than the present. The father and mother were both natives of *England*. They had no long residence in *Guernsey*; and, after the father's death, there was an end of the only tie which connected the family with that island. That the mother should return to this country, and bring her children with her, was so much a matter of course that the fact of her doing so can excite no suspicion of an improper motive. I think therefore the Master has rightly found the deceased children to have been domiciled in *England*. It is consequently by the law of this country that the succession to their personal property must be regulated.

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June 25.

Z. LEVY and E. PACIFICO, - - PLAINTIFFS;
AGAINST
E. LINDO, and HOGGART and PHILLIPS, (Auctioneers,) - - - - DEFENDANTS.

On a bill for specific performance, the questions, whether time was originally of the essence of the contract, and whether, being so, the defendant has done any act whereby he has waived it as a ground of objection to the performance, are questions depending on evidence, and not to be decided except upon the hearing.

Motion for an injunction to restrain proceeding in an action for recovery of the deposit, opposed upon that ground, and upon the ground of other objections to the title, which could not be disposed of except at the hearing, was therefore granted.

THE plaintiffs, who, together with *Macirone*, were devisees in trust for sale under the will of *Angelo Levy*, put up the premises in question to auction in the month of *May* 1816, when the defendant *Lindo* became the purchaser upon the conditions of the sale, one of which was, that the purchaser should pay a part of his purchase money by way of deposit at the time of sale, and sign an agreement to pay the remainder on the 24th of *June* following, upon having a good title. The abstract being delivered, several objections were taken on the part of the purchaser: one of which objections was, that *Macirone* (one of the devisees) being an alien, one-third of the estate fell to the crown on the death of the testator; another, that the son and heir at law was an infant, and the will could not be established during his minority; and a third objection was, that the testator had committed an act of suicide by throwing himself out of window, in consequence of which he died, and the coroner's inquest had found a verdict of insanity, —that, during the interval between the commission of the act and his death, the will in question was made,— and it was therefore at least doubtful if that will could be established. These objections not having been removed to the defendant's satisfaction, his solicitor, in the month of *December* 1816, gave notice in writing to the

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solicitor for the plaintiffs, that he considered the contract at an end, and should require his deposit to be returned. After receiving this notice, the plaintiffs proceeded to remove the first of the objections by obtaining a warrant under the sign manual for a grant of the third part of the premises which had fallen to the Crown. But a doubt then arose whether this grant was effectual, upon the ground that the right to an undivided third part having fallen to the Crown, would draw after it the entirety; in which case the grant of that third part only, would not cure the defect of title. With the view of removing the doubt as to the validity of the will, a bill has been filed by the plaintiffs to have the trusts of the will established.

Under these circumstances, the defendant (the purchaser) brought his action against the auctioneers to recover back the deposit; whereupon the present plaintiffs filed their bill for a specific performance of the agreement, and for an injunction to stay proceedings in the action so commenced. The defendant (the purchaser) by his answer, relied on the validity of his objection on the ground of alienage, insisting on an abatement, in respect of the deterioration of the premises, in case the Court should be of opinion that a good title could be made.

Bell and *Perkins*, for the plaintiffs, now moved for an injunction.

Sugden and *Pemberton*, contrà, opposed the motion on the ground, first, that time was, in this case, of the essence of the contract; the conditions of sale providing for the completion of the title within a month from the time of the sale; the premises consisting of a house, the value of which was considerably diminished, and

which

which would continue from day to day to deteriorate, in consequence of its being left untenanted, which it had been ever since *Midsummer*;—that it was clearly settled, (as in *Lloyd* v. *Collett* (a),) that a specific performance shall not be enforced, not only where no steps have been taken by the vendor, but even (in cases of unreasonable delay,) after steps have been taken, and where the purchaser has been actually let into possession; as in *Dickenson* v. *Heron* (b), where the *Master of the Rolls* said that the defendant might have waived the agreement, if, upon the delay in the first instance, he had resisted the specific performance. And they also relied on the objections before mentioned.

Bell, in reply.

These objections to the title cannot be allowed to prevail. The manner of the testator's death was publicly known—the death itself was announced by advertisement in the regular way. The purchaser cannot be taken to have been ignorant of it, or of the circumstances attending it; and he must be presumed to have been satisfied.

Besides, a bill has since been filed to have the trusts of the will established, and the contract cannot be said to be at an end on that ground of objection. Time cannot be established as a valid ground of objection to a specific performance, except at the hearing of the cause, because whether it is an objection or not, depends on a variety of circumstances. And it has for this reason been repeatedly decided, that the Court will not entertain the question on a demurrer.

(a) 4 Bro. 469. 4 Ves. 689. Sugd. Vend. & Purch. 307. (4th ed.)

(b) Sugd. Vend. & Purch. 397.

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The LORD CHANCELLOR.

With regard to the form of this application; generally speaking, it is almost of course to entertain such a motion on the part of the vendor; the auctioneer, who is the nominal defendant at law, being merely in the situation of a stake-holder. There may be cases in which the Court would refuse to interfere, but this must be by reason of the particular circumstances.

As to the objections which have been made to the performance of the contract, that on the ground of the heir at law being an infant, might appear to have some weight in it, but for the decisions which have established that, on a contract under a devise in trust to sell, the purchaser is bound, notwithstanding the infancy of the heir at law. Then as to time—Lord *Thurlow* has said, on occasions without number, that time is not of the essence of the contract, and that not even the agreement of the parties can make it so. (*a*) I have deviated from that rule, so far as to say that time may, in certain cases, be of the essence of the contract; and there is no species of purchase to which the reason of this deviation is more applicable than to that of a house for residence. But, in order to this, it must be shewn that the terms of the contract made time of the essence of the contract, and also that the conduct of the parties has not been such as to alter it in that point; for the benefit of the objection in respect of time may be waived, even although it was originally made essential. Therefore the question, whether time was originally of the essence of the contract, and whether, (if it were,) it continued to be

(*a*) See *Seton* v. *Slade*, 7 Ves. 265—273, 4, &c. and the cases there referred to. *Hearne* v. *Tenant*, 13 Ves. 287. *Lennon* v. *Napper*, 2 Scho. & Lef. 682. Sugd. Vend. & Purch. 303, 4.

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so, are questions depending on evidence, and not to be determined on the present application. Neither am I able to decide upon the objection with respect to the insanity of the testator. For, admitting that by the coroner's verdict he must be taken to have been insane at the time of the act committed, in consequence of which he died, it does not follow that he continued insane during the whole interval from the commission of that act to his death, or that he was so at the time of making his will. There are cases of wills being established, which were made during the intervals of delirium, because they have contained internal evidence of their being reasonable and such as a man in his senses may be supposed to have made. So the question in this case must materially depend on the will itself— the circumstances of its attestation, and its reasonableness—which may be such as to establish the will without any dispute.

Order for an injunction to restrain the defendant, the purchaser, from proceeding in his action; and the deposit to be paid into Court.

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Rolls.
April 29.
May 1. 6.
July 29.

JACOB PRIDDY and Others, - - Plaintiffs;

AND

The Right Hon. GEORGE ROSE, (Treasurer of the Navy), JOSEPH HUNT, WILLIAM MACKWORTH PRAED, CHARLES SHORT, and The ATTORNEY-GENERAL, Defendants.

A., by marriage settlement, covenants for payment within four years, to the trustees, of a sum of £4000, the dividends whereof, and of other funds thereby settled, are made payable to himself for life. He afterwards obtains a pension from Government, by warrant of the Treasury, made payable to him and his assigns by the Treasurer of the Navy out of a certain fund, during the life of the grantee.

A. subsequently absconds, being largely indebted to the Crown, and not having paid the 4000*l.* according to the covenant in his settlement; and, upon his departure, the pension is withdrawn by order of Council, and the trustees of the settlement stop the payment of the dividends of the other funds to which he was entitled for life under the settlement.

A. having granted annuities secured by assignment of his pension and of these dividends, on a bill by the annuitants against the Treasurer of the Navy and the Attorney-General, for recovery of what was in the hands of the former on account of the pension, and against the trustee of the settlement for dividends accrued since *A.*'s departure; held, as to the first, that this Court has no jurisdiction; and, as to the second, that the trustees, who had no notice of the assignment, were entitled to retain the dividends in satisfaction of the covenant; and the bill was therefore dismissed against all the defendants.

The equity of the trustees was to stop the dividends, not only immediately on failure of performance of the covenant, but at any time after, at their discretion.

The assignee of a chose in action takes it subject to all the equities to which it was liable in the hands of the original grantee.

Quære, Whether the pension from Government in this case is assignable within the policy of the law.

BY settlement, made previous to the marriage of the defendant *Hunt* with *Catherine Davie*, dated the 4th of *April* 1795, reciting that *C. D.* was entitled to two

Quære,

two several sums of 5145*l.* and 1029*l.*, and that it had been agreed that the said sums should be assigned to the defendants *Praed* and *Short*, their executors, &c. upon the trusts thereof, and had been further agreed that the defendant *Hunt* should, previous to the marriage, lay out and invest 4000*l.*, and should enter into a covenant for investing, within four years, a further sum of 4000*l.*, in the purchase of stock, in the names of the said trustees, upon the same trusts; and that, in part performance of the agreement, the first 4000*l.* had been already invested in the purchase of 6438*l.* *3 per cents.*, which then stood in the names of the said trustees at the Bank; it was witnessed, that the said *C. D.* thereby assigned to the said trustees, their executors, &c. the sums of 5145*l.* and 1029*l.*, and all interest, &c., and Sir *John Davie* (her father) covenanted within two years to raise and pay the same, with interest in the mean time; and the trusts thereof, and also of the said 6438*l.* stock, were declared, to pay to the defendant *Hunt*, or permit him to receive, the interest and dividends thereof for his life, and, after his decease, in trust for the wife and children of the marriage as therein mentioned. And the defendant *Hunt* thereby covenanted as to the further sum of 4000*l.*, to be invested as aforesaid, according to the recital.

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Quære, as to the right of the crown to retain the pension in discharge of a debt due from the grantee in a different capacity from that in which it was granted him.

The marriage took place, and the two sums of 5145*l.* and 1029*l*, were paid to the trustees at different times, and invested by them in stock, making, together with the 6438*l.*, in all, 15,585*l.* 3 *per cents.*, standing in their names on the trusts of the settlement; the dividends whereof the defendant *Hunt* received up to the 5th of *January* 1810, when he absconded, without having ever paid the second 4000*l.* according to his covenant; after which time the trustees received the dividends, and invested the same from time to time in stock.

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in satisfaction, as they themselves alleged, of that covenant.

In 1802, by grant under his sign manual, His Majesty, "in consideration of the long and faithful services "of the defendant *Hunt* as a commissioner for conducting the Transport service," granted to him an annuity, or yearly pension, of 500*l.*, payable out of monies to arise from the sale of naval stores, to commence from the 15th of *May* 1802, and to continue during his life; "to be suspended, nevertheless, when "and so long as he should be and continue in possession "of any office, place, or employment, or offices, places, "or employments, the annual value of which, taken "separately or together, should amount to 1000*l.* or "upwards—" or not amounting to 1000*l.* *per annum*, then, as to so much of the said pension, as, together with the annual value aforesaid, should exceed 1000*l.* *per annum*—and, by a warrant dated the 17th of the same month, signed by the Commissioners of the Treasury, and directed to the Treasurer of the Navy, it was ordered that, "out of any monies that might or should "from time to time be and remain in the said Trea-"surer's hands, or in the hands of his cashier, to arise "by the sale of old naval stores, he the said Treasurer "should pay or cause to be paid to the defendant or "his assigns" the said annuity or pension, "to con-"tinue during his natural life, and to be suspended "nevertheless in the case and in the manner before "mentioned."

By indenture, dated the 3rd of *October* 1802, the defendant *Hunt*, in consideration of 4000*l.*, granted to the plaintiff *Priddy*, his executors, &c. an annuity of 500*l.* during the life of the defendant, for securing the payment whereof he assigned to a trustee for the

plaintiff

plaintiff the said pension of £500, and all powers and remedies which he had for recovering or obtaining payment thereof, appointing him his attorney "to demand, "recover, and receive the same from the Treasurer of "the Navy for the time being, or other person or persons who should be warranted or authorised to pay "the same," and also to receive from the trustees of his marriage settlement the dividends of the stock to which he was entitled for life as aforesaid, upon the trusts therein mentioned.

The defendant *Hunt* afterwards surrendered his pension and obtained a new grant, by warrant under the sign manual, also addressed to the Treasurer of the Navy, of a pension of £537 18*s*. payable in like manner, and subject to similar conditions, with the former, but to be suspended only in case of the defendant's being in possession of any office, &c. to the amount of £1500 *per annum*.

By indenture dated the 8th of *July* 1806, the defendant granted two other annuities, of £305 14*s*. to the plaintiffs *Holme* and *Pollard*, secured in like manner with the former, by an assignment of the pension and dividends of stock.

The three annuities so granted were regularly paid up to the 18th of *June* 1809, since which no further payment had been received in respect thereof. The bill, alleging the above facts, further stated that, by reason of the regular payment of the annuities to the time aforesaid, the defendant *Hunt* had been suffered to continue in receipt of the dividends of stock, and of the pension; that he received the latter to the 23d of *June* 1809, and the former to the 5th of *January* 1810, since which he had received nothing in respect of either;

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either; and that in *February* 1810 he went abroad, and had ever since continued abroad; charging that the defendant *Rose*, as Treasurer of the Navy, received the pension which became due on the 23d of *June* 1810, out of the money applicable to the payment thereof, and had, in pursuance of his Majesty's warrant, appropriated the same; that the plaintiffs had caused notices to be served on the trustees of the settlement, and applications to be made to them, and to the Treasurer of the Navy, with which they had respectively refused to comply; therefore praying that accounts might be taken of what was due on the annuities, and of the arrears of pension, and dividends; that the plaintiffs might be paid thereout, &c.; and for an injunction to restrain the Treasurer of the Navy, and the trustees, from paying away any of the monies coming to their hands respectively.

From the answers of the Treasurer of the Navy and of the Attorney-General, it appeared that the defendant *Hunt* was, in *April* 1807, appointed to the office of Treasurer of the Ordnance, which he held till *January* 1810, when he absconded, and, upon investigation of his debts, was found to be indebted to the Crown in 93,834*l.*, in respect of monies received as Treasurer; upon which extents were issued, and the balance still remaining due was 90,000*l.* and upwards; and that by an order in Council dated the 4th of *March* 1812, it was ordered that his pension be withdrawn and no longer allowed, and such part thereof as remained unpaid up to the 30th of *December* 1811 be withheld, and considered as applicable to the liquidation of his debt to the public.

The defendants, the trustees of the settlement, by their answer, said they had had no notice, or knowledge,

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ledge, of the annuities, until *February* 1810, (after *Hunt* had absconded,) when they were first served with a written notice of the deeds of 1802 and 1806. They put in issue the validity of those instruments, stating different objections thereto, on the grounds of inadequacy of price, and defect of memorials; and, as to the second, of its containing in fact two grants of distinct annuities, with only one stamp for both. They alleged that *Hunt*, having broken his covenant to invest the 4000*l.*, had become a debtor to them for that amount, and that they were therefore entitled to retain, as against him and all claiming under him, the dividends of stock, until that sum should be raised, the money due in respect of dividends being a just debt at law, and upon a covenant entered into for valuable consideration. They insisted that the plaintiffs could be in no better situation than *Hunt* himself, claiming through him; alleging that the plaintiffs had notice of the covenant from the indenture of settlement, and that they had made no inquiry respecting the same previous to the grants of their respective annuities.

Hart, *Bell*, and *Heald*, for the plaintiffs.

The first question is as to the right of the Crown to retain the pension, either on the ground of set-off against the debt due to the Crown from its grantee, or by virtue of the Order in Council for its revocation.

This pension is an annuity granted by the Crown for the life of the grantee; and it was at one time doubted (*a*) whether such an annuity was assignable, being only a *chose in action* (*b*), without express words

(*a*) Co. Litt. 20. *a*. 144. *b*. 5. 2 Vin. Ab. 515. Annuity
(*b*) *Baker* v. *Brooke*, Moor, F. 6. pl. 3.

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so to render it. (*a*) But this has been long since settled (*b*); and, in the case of *York* v. *Twine*, in the Court of Wards (*c*), where the queen had granted under her great seal an annuity for twenty-one years, to be paid by the Receiver of the Court of Wards, which was afterwards sold under an extent; and the question was, Whether the sale was good: it was resolved that the pension was well extendable, and well sold by the sheriff; for, being an annuity certain, and for years certain, and payable by the Receiver, it was in the nature of a rent-charge for twenty-one years, and was well grantable over and vendible, and not like to an annuity which chargeth the person only.

Then, if in its nature assignable, this pension had been actually assigned before the extents issued,—there is no evidence when the debt to the Crown accrued; and such an annuity is merely personal property, and not liable to an extent, so as to defeat a prior *bonâ fide* purchaser, as appears from *Allen* v. *Dundas* (*d*), where it was held that the defendant, as Treasurer of the Navy, being indebted to a person who died intestate, for the arrears of his pension, and having paid it to one who claimed as executor under a forged will, was not bound to pay it over again to the true claimant. So in *The Earl of Stafford* v. *Buckley* (*e*), an annuity granted by the Crown out of the *Barbadoes* duties, was determined not to be a rent within the statute *de donis* or the statute of frauds, but that being entailed on the grantee

(*a*) *Maund's case*, 7 Co. 28. *b*. Rent-charge granted to one and his assigns, *pro concilio impendendo*, may be assigned over by the express words of the grantor, who granted "to him and his assigns;"—for *modus et conventio vincunt legem*.

(*b*) *Gerrard* v. *Boden*, 2 Vin. Ab. 515.

(*c*) Cro. Jac. 78.

(*d*) 3 T. R. 125.

(*e*) 2 Ves. 170.

and

and the heirs of his body, with remainder over, that was a fee-simple conditional at the common law, and the remainder over void. And in *The Countess of Holdernesse* v. *Marquis Carmarthen*, (*a*) an annuity of 4000*l.* charged on the post-office revenue, to continue until 100,000*l.* should be raised, to be laid out in land, was resolved to be a mere personal annuity, and, as such, that it was capable of passing by grant or transfer. This does not fall within the cases in which it has been held that government pay and pensions are not assignable, upon the ground of public policy. The true question is, Whether, as an annuity, it is within the statute 13 *Eliz. c.* 7.; and, if so, it was clearly assignable, and the crown had no power to revoke the grant, which was absolutely for life, or defeat the prior claim of the assignee for a valuable consideration. (*b*) The case much resembles that of *The Earl of Stafford* v. *Buckley*. The annuity

(*a*) 1 Bro. 377.

(*b*) In Ex parte *Butler*, 1 Atk. 210. the question was, Whether the office of city-marshal was saleable for the benefit of creditors under the 13 *Eliz.*; and Lord *Hardwicke* held that it was, not being within the statute of *Edward* 6. concerning offices connected with the administration of justice; and, in giving his judgment, his Lordship said, "If an officer in the army should become bankrupt, he should have no doubt but he had a power to lay his hands on his pay for the benefit of his creditors. But Mr. *Cooke* (Bankr. Laws, 284. edit. 5.) observes that this is only *obiter dictum*, and it had been determined otherwise in the House of Lords, on an appeal from *Scotland*, in the case of *Cathcart* v. *Blackwood*. See also *Flarty* v. *Odlum*, 3 T. R. 681. *Lidderdale* v. *Duke of Montrose*, 4 T. R. 248. "Emoluments of this sort are granted for the dignity of the state, and the support of those who are engaged in the service of it, and it would be therefore impolitic to permit it to be assigned: besides, an officer has *no certain interest* in his half-pay; for the king may at any time strike him off the list." Dict. per Lord Kenyon.

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annuity is not revocable—not dependent on the pleasure of the crown—expressly made to the grantee and his assigns—and assignable like any other annuity so made payable.

Then, as to the claim of the trustees, they might have retained the dividends from the moment when default was made in performance of the covenant to invest the 4000*l.*; and their *laches* in not availing themselves of the remedy within their reach, affords an equity to the plaintiffs, who took the assignment at a period long subsequent, and without notice that the covenant was yet remaining unsatisfied. The conduct of the trustees has been indefensible. They have been guilty of a direct breach of trust, and they come forward and say they have a right to be reimbursed to the extent of their liability by reason of the breach of trust they have committed. This cannot be allowed them, so as to defeat the rights of a subsequent *bonâ fide* purchaser.

Sir *A. Piggott* and *Mitford*, for the Attorney-General.

This is an entirely new case, and in which the Court has no jurisdiction. If the funds in question had passed out of the hands of the crown, and had been with a third person, as a stake-holder, such third person might have been made a party to a suit here. But the money out of which this pension was granted is in the hands of the officer of the crown, and is therefore under the jurisdiction of the Court of Exchequer; unless it were sought to be recovered upon a petition of right, or *monstrans de droit*, which might be prosecuted in either court. (*a*)

(*a*) Bro. Ab. tit. *Prerogative le Roy*, pl. 2. Fitzh. Ab. tit. *Error*, pl. 8. Skinn. 609.

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Independent of the question, Whether the grant of a pension will admit of an assignment in equity, this is only an equitable assignment—and what remedy is there at law if the pension is not paid? There can be no remedy against the Crown, and the fund out of which it is payable is a fund belonging to the Crown. True, an equitable interest may be the subject of assignment—but it has been decided in many cases (*a*) that a pension from the Crown is not assignable. No voluntary sanction from the Crown can be assigned; according to what is said by *Ashhurst* J. in the case of the half-pay officer. (*b*) "All voluntary donations of the Crown are for the honour and service of the state."

It is the fault of the annuitant if he has contented himself with taking an insufficient security for the payment of his annuity. Suppose, in this case, instead of a pension from the Crown, it had been an annuity granted by an individual, subject to the same conditions—that the grantee, after having assigned it as a security to another, had accepted an office within the terms provided for the cessation of his annuity, and then made default to his assignee—what remedy could his assignee have by virtue of that assignment? As long as the original annuity remained payable, so long, and no longer, did his security continue. Then has this pension ceased? The grant has been revoked by the Order in Council; and it is impossible to contend that the Crown has not authority to revoke its own grant; the grantee being a public accountant, and having made default. How could he have a specific performance of a voluntary grant from the Crown? The Order in Council not only goes to future payments, but withholds money in the hands of the officer of the Crown

(*a*) See note (*b*), p. 93. (*b*) *Flarty* v. *Odlum*, 3 T. R. 683.

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for payments already due, and directs that the whole shall be considered as applicable to the reduction of *Hunt's* debt to the public. The Treasurer of the Navy is not like an ordinary stake-holder.—He is the King's receiver, and amenable to the Court of Exchequer. The word "assigns" in the grant—to him and his assigns—constitutes no obligation on the part of the Crown towards such assigns. It is still no more than a voluntary act on the part of the Crown, the performance of which can be only during its own will and pleasure. It is the intention of the Crown that it shall continue during the life of the grantee—but if the Crown afterward thinks fit to change that intention and revoke the gift, how is the performance of that voluntary act to be enforced? Could the grantee of the pension himself, having made default in his own accounts with Government, have compelled payment notwithstanding? If not, how could he communicate to another a right which he has not himself? Can he call upon the Treasurer of the Navy, an officer of the Crown, to make payment, against the express order of the Crown? Can he compel the servant to disobey the command of his master?

[*The* MASTER *of the* ROLLS. Suppose this pension were legally assignable, what effect would the Order of Council have had?]

Sir A. Piggott.

The question in that case would certainly be difficult. But this cannot be treated as a legal assignment.—And if it were, where could be the legal remedy?

To return to the point of jurisdiction—"Chancery," says *Blackstone* (a), "can give no relief against the King,

(a) Comm. Book 3. ch. 27. p. 428.

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king, or direct any act to be done by him, or make any decree disposing of or affecting his property. Such causes must be determined in the Court of Exchequer, as a Court of Revenue, which alone has power over the king's treasure, and the officers employed in its management." And so in the case of the *York Buildings Company*(a), Lord *Hardwicke* said, that an account between the king and a subject cannot be taken in any case in this Court, but in the Exchequer only. And in *Reeve* v. *The Attorney-General*(b), where, the question being, Whether an estate escheated to the crown could be affected with a trust, his Lordship said, "Suppose the "land had been seized and put in charge, could he "make a decree that it should be sold?—No—he "could not;—but the Court of Exchequer might, as "it is a Court of Revenue."

(a) 2 Atk. 56. *Huggins* v. *The York Buildings Company*, Reg. Lib. A. 1739. fol. 552. A. 1740. fol. 139. from which I have been favoured with the following extract. "Bill by creditors of the Company against the Company and the Attorney-General and the trustees, under a deed for the payment of debts. The Company had purchased the forfeited estates, and had not paid for them; and the Attorney-General claimed what remained due to the crown for the purchase money of the said forfeited estates.

"The cause was heard on several days, and the Court took time to consider. One of the plaintiffs, of the name of *Blackwell*, died. Abatement. Two bills of revivor by *Blackwell's* representative. Plea to the second of a former bill pending. Reference to the Master to see which bill ought to be prosecuted—and divers other proceedings.

"It seems that what the Chancellor is reported, in 2 Atk. 56, to have said respecting the jurisdiction, took place during the hearing, and arose in consequence of the Attorney-General's claims: but the Chancellor afterwards decreed the estates to be sold, and the purchase money owing to the crown to be paid out of the produce of the sale."

(b) 2 Atk. 223. See *Hovenden* v. *Lord Annesley*, 2 Scho. & Lef. 617.

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Jarvis and *Wyatt*, for the defendant, the treasurer of the navy.

This is no more than an attempt to obtain indirectly a decree against the crown through the medium of the crown's officers. Whether an action would lie, at the suit of the grantee himself, for the arrears of the pension actually due at the time of the date of the order in council, may admit of some question, though the order in council would probably be a sufficient answer even to such a demand as that.

If there were no doubt as to the jurisdiction, still the policy of the law would be conclusive against such a pension being assignable. This pension is in the nature not only of a reward for past, but a retainer for future, services; and it is as contrary to policy to permit the assignment of it, as of the half pay or full pay of an officer. In the case cited of *Flarty* v. *Odlum*, *Buller*, J. says, "If the question had been, Whether or no the pay "then actually due might be assigned, he should have "thought it, like any other existing debt, assignable; "but that does not extend to future accruing payments." The grant of this pension evidently looks to the future employment of the grantee, and is in the strictest sense "a voluntary donation of the crown, for the honour and service of the state." In *Barwick* v. *Reade*, (*a*) where it was decided that an officer's full pay is not assignable, *Gould*, J. refers to a case in *Dyer* (*b*) as confirming the general principle.

(*a*) 1 H. Blackst. 628.

(*b*) Dyer, 1 *b*., stated in the note to the above case, where is also noticed the distinction made in *Stuart* v. *Tucker*, 2 Blackst. 1137., between full pay and half pay, as the subject of assignment, the one being *pro servitio impendendo*, the other *pro servitio impenso*.

If it is in respect of the term "assigns" that the pension is to be held assignable, the Crown has still the right of retainer against its own debtor. The cases referred to from *Viner* prove no more than that an annuity is a chose in action, and assignable in equity. Undoubtedly it is so. But has not the Crown a right to retain it to satisfy its own debt? The fact of the extent issued is introduced only to shew that, prior either to the time of filing the bill, or notice of the assignment, *Hunt* was a debtor to the Crown to a greater amount than the arrears of his pension. We do not even put it on the ground of the right in the Crown to a preference or priority. The case might have been different, had notice been given: but the present bill, which alone gave notice, was not filed until after *Hunt* had absconded.

Sir *S. Romilly* and *Winthrop* for the defendants, the trustees in the settlement.

Turton v. *Benson* (*a*), *Coles* v. *Jones*. (*b*) A bond is a *chose in action*, assignable only in equity; and, when assigned, is liable to the same equity as if it were still remaining with the obligee. The purchaser of a *chose in action* must always abide by the title of the person of whom he purchases.

Hart in reply.

The defence on the part of the officers of the Crown is threefold. *First*, that this Court has no jurisdiction;— *Secondly*, that the pension is not in its nature assignable;

(*a*) 2 Vern. 764. 1 P. Wms. 496.

(*b*) 2 Vern. 692. See *Davies* v. *Austen*, 1 Ves. j. 249. Sugd. Vend. & Purch. 600. (5th edit.) *Daubeny* v. *Cockburn*, ante, Vol. I. p. 633. *Cholmondeley* v. *Clinton*, Vol. II. p. 241.

 —*Thirdly*,

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—*Thirdly*, that the Crown had a right to retain against the assignees, even supposing the assignment otherwise valid.

I admit that the Exchequer is the only Court of competent jurisdiction in questions upon matters of revenue. But that peculiar jurisdiction does not obtain in any but mere revenue cases. Here the question is, Whether, under the grant of this pension, the money out of which it is made payable is not in the hands of the Treasurer of the Navy as a trustee for the plaintiffs. It may be a question at law whether the grant itself was such as the Crown is competent to make—but, being made, our proposition is that, from that instant, it was held in trust for the grantee and his assigns; and, if so, this is no question of revenue—it is simply a question, Whether the Crown has a right to stop the payment *in transitu* for the discharge of its own debt. In *Burgess* v. *Wheate* (a), where the question first arose whether there was not an escheat to the Crown, the Court did not refuse to entertain it, but the cause was ordered to stand over, to make the *Attorney-General* a party, who afterwards filed an information. So there was no objection to the jurisdiction in the case of *The Attorney-General* v. *Duplessis* (b), and many others. Where the rights of the

(a) Blackst. Rep. 123. 1 *Eden*. Cases in the time of *Lord Northington*, 177. 181. "The cause came on to be heard before Lord *Hardwicke*, C., who, on the pleadings being opened, objected to the *Attorney-General*'s not being a party. Both parties were desirous that there should be no question about the escheat, and the *Attorney-General* did not insist upon it. But the *Lord Chancellor* asking him if he waved any right the Crown might have, and would consent that it might be so entered, the cause stood over, and the *Attorney-General* was made a party."

(b) 2 Ves. 286.

the Crown are only incidentally brought in question, they may as well be discussed in this Court as in the Court of Exchequer.

This is the case of a pension given as a compensation for past services; and the distinction as to the assignability of a pension is between its being a reward for past, and in the nature of pay, or wages, for concurrent services. The question is, Whether the Crown has any right to withdraw a pension of the former description.

[Mr. *Hart* then reverted to the case before cited, of *The Earl of Stafford* v. *Buckley*, and to the proceedings in a case of *Aubin* v. *Daly*, in which a decree (*a*) was lately made by consent, on a bill by a mortgagee, for sale of the very annuity which was the subject in question before Lord *Hardwicke* in the former case; in order further to prove the assignability of such an annuity.]

Then as to the trustees in the settlement—true, the assignee of a *chose in action* takes it subject to all the equities with which it is invested. But this is only where he has express notice of those equities. Here, the settlement could not give the plaintiffs such notice; for they were not to suppose that the covenant had not been performed; and the trustees were, in the due execution of their trust, bound to have seen to the performance of it, and to have exacted the debt at the moment when it became due. After remaining inactive for so many years, they shall not be allowed to take the benefit of their own *laches* to defeat the claims of *bonâ fide creditors* upon the funds, which they now insist upon having a right to retain.

(*a*) At the Rolls, Feb. 17, 1817.

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The plaintiffs in this case are certain annuitants of Mr. *Joseph Hunt*, who, as a security for the annuities which he granted them, assigned to them a pension he had from the crown, and the dividends of certain funds, to which he was entitled for his life under his marriage settlement. The bill is filed against the *Treasurer* of the *Navy*, and the *Attorney-General*, for the recovery of what is in the hands of the former on account of Mr. *Hunt*'s pension, and against the trustees in the settlement, for the dividends that have accrued on the funds since the time when Mr. *Hunt* himself ceased to receive them. On the part of the *Treasurer* of the *Navy*, and the *Attorney-General*, it is objected, that the Court has no jurisdiction to order the payment of this money.—On the part of the trustees, it is stated, that although by the settlement Mr. *Hunt* was entitled to the dividends in question for his life, yet by the same settlement he had covenanted to pay them 4000*l*., to be laid out on the like trusts as the other funds—that as he has never performed his covenant, they have a right to stop the dividends, and to apply them as far as they will go, to make good the sum which Mr. *Hunt* ought to have paid them.

It is clear that a suit may be maintained against a public officer, having in his hands money issued by government for the use of an individual, for the recovery of such money.

As to the first demand,—where a public officer has in his hands money issued by the Government for the use of an individual, it is clear, that a suit may be maintained against the officer for the recovery of such money. For it is his duty towards the Crown, as well as towards the individual, to apply the money to its destined purpose. But here the officer is commanded by Government to withhold the money from Mr. *Hunt*, and to apply it towards satisfaction of a debt which Mr. *Hunt* owes the public. Then the question is between Government and Mr. *Hunt*,

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But, where government has ordered the money to be withheld, the question is only between government and the individual or his assignee; and this Court has no jurisdiction.

Hunt, or Mr. *Hunt's* assignee; and it is not, I apprehend, in this Court, that such a question can be decided. In the case of *Row* v. *Dawson*(a), Lord *Hardwicke* entertained the jurisdiction singly on the ground that the officer admitted the money to be in his hands for the use of the person under whom the litigating parties made their claim. That was the case of a public officer who had given a draft for payment of a sum which he had borrowed, upon money due to him out of the exchequer, and afterwards became bankrupt; and the question was "whether the defendants" (to whom the draft had been given) "were first entitled by a specific lien upon "the sum due to the bankrupt's estate; or whether the "plaintiffs, the assignees under the commission, were "entitled to have the whole sum paid to them; it being "insisted for them, that this draft was in nature of a "bill of exchange, and that the property was not di-"vested out of the bankrupt at the time of his bank-"ruptcy." The *Lord Chancellor* said, he at first doubted his own jurisdiction, and whether the plaintiffs (the assignees) ought not to have gone into the *Exchequer* as being a Court of Revenue; for this was not a personal credit given to, or demand upon, the officer, but to be paid out of the money issued out of the *Exchequer* to that officer, on warrant to be paid out of the Revenue of the Crown for public services. "But," he adds, "there is something in the present case delivering "it from that; the officer admits, he has received a sum "of money applicable to this demand; which brings it "to the old case of a *Liberate*, which a person has "under the Great Seal for the payment of money, upon "admission that the officer had money in his hands "applicable to the payment, and proof thereof, that "would give Courts of law a jurisdiction; so that an "action of debt might be maintained on the *Liberate*."

(a) 1 Ves. 331.

It

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It is sufficiently evident, that, if the officer had, on behalf of Government, disputed *Gibson*'s right to the fund, Lord *Hardwicke* would not have proceeded in the cause: but *Gibson*'s right being admitted, it was a merely equitable question, which of the parties claiming under him had the best title to the money. Besides, if, in this case, the assignment, (as is contended by the plaintiffs,) passed not merely the equitable, but the legal title to the pension, why does the assignee come into a Court of Equity? If, on the other hand, he be only an equitable assignee, and as such stands precisely in *Hunt*'s place, he would probably find it difficult, in any Court, to maintain that the pension can be claimed from Government, while the debt to Government remained unsatisfied. However, that is a question which I do not think this Court ought to determine. The bill must be dismissed as against the *Attorney-General* and the *Treasurer* of the *Navy*.

II. As to the question between the plaintiffs and the trustees, it arises on the following facts.—Mr. *Hunt*'s marriage settlement was in *April* 1795. The 4000*l.* became payable in four years afterwards, that is, in *April* 1799. It does not appear that the trustees ever made any application for the payment of the money. The first annuity was granted in 1802; the others in 1806; Mr. *Hunt* absconded in 1810; down to which time he had received the dividends under a power of *Attorney* from the trustees, and had paid the annuities as they became due. No notice had ever been given to the trustees of the assignment of the dividends, until after *Hunt* had absconded. The question is, whether the dividends can be stopped. See how the case would have stood between the trustees and *Hunt* himself. I apprehend it to be clear that he could not have claimed a benefit under the settlement without making

good

good his part of it. The trustees might give him what credit they chose, subject to their responsibility to their *cestui que trusts:* but they might, at any time after the 4000*l.* became due, have stopped the dividends, if the money was not paid. Supposing he had become a bankrupt, the trustees would have this equity as against the assignees, as was determined by Lord *Thurlow* in *Ex parte Mitford* (*a*).

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I have had a copy of the order in that case from the bankrupt's office, in order to see whether the case be correctly stated by Mr. *Brown.*

Mr. *Mitford,* under the marriage settlement, was entitled to an annuity of 24*l.* *per annum,* and to the dividends of certain stock during his life. He had covenanted to pay 6000*l.* in the whole to the trustees, at different periods, and on different events. It became a question, whether the whole of this sum had become a debt at the time of the bankruptcy. The trustees in the settlement presented a petition praying to be at liberty to prove the whole sum under the commission, and to be permitted to retain the interest the bankrupt took under the settlement, in part satisfaction of the debt. The order made was as follows. It was "declared that the petitioners were, at the time of "issuing the commission, creditors of the bankrupt for "the sum of 3000*l.* only, which, by the settlement, was "payable at the times and in the manner mentioned in "the petition, free from any contingency; and that the "petitioners were entitled to retain the value of the "bankrupt's equitable interest under the settlement in "an annuity of 24*l.* and a sum of 2074*l.* bank annui- "ties towards satisfaction of the said 3000*l.*" And "it was referred to the commissioners to compute in- "terest on the sum of 1000*l.* (part of the 3000*l.*) from

(*a*) 1 Bro. 398.

"the

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"the date of the commission to the 14th of *October* "then next, when the said 1000*l.* would become pay- "able under the settlement, and on the sum of 1000*l.* "(other part of the 3000*l.*) from the same date to the "14th of *October*, 1785, when the last-mentioned "1000*l.* would become payable under the settlement, "and on 1000*l.* (residue of the 3000*l.*) from the same "date to the 14th of *October*, 1786, when the last-men- "tioned sum would become payable as aforesaid; what "should be found the amount of such interest to be "deducted from the 3000*l.* The commissioners to "set a value on the bankrupt's interest under the settle- "ment in the annuity of 24*l.* and sum of 2074*l.* bank "annuities, and what should be found to be the value "thereof to be deducted from what should remain due "in respect of the 3000*l.*, after such rebate of interest "as aforesaid. The petitioners to be admitted creditors "under the commission for what should be the then "residue of the 3000*l.* And, in regard to the 24*l.* "annuity during the joint lives of the bankrupt and his "wife, and the interest to accrue on the 2074*l.* bank "annuities during the life of the bankrupt," it was "ordered that they be respectively retained by the pe- "titioners towards satisfaction of the 3000*l.*—and that "the dividends from time to time to be made under the "commission upon the sum of money for which they "should be so admitted creditors, should be laid out by "them in the purchase of 3*l. per cent.* bank annuities in "their names; and the interest to accrue thereon during "the life of the bankrupt, to be paid from time to time by "the petitioners to the assignees under the commission, "as part of the estate and effects of the bankrupt." (*a*)

Now if, as against *Hunt*, the trustees had the equity of stopping the dividends to make good the debt of 4000*l.*

(*a*) In the matter of *Robert Mitford*, a bankrupt, 11 Aug. 1784. Orders in Bankruptcy, 1784. fo. 211.

4000*l.* could he by this act, without their knowledge or consent, deprive them of that equity? The assignee for the annuitants, taking no legal interest in the funds, could only take subject to the same equity to which the assignor was liable. What was the original equity of the trustees?—Not to stop the dividends merely at the first moment the debt became due, but whensoever they might think the interests of the trust required that step to be taken. They had no room to imagine that it signified to any but their *cestui que trusts*, whether this debt was, or was not exacted, when it became due. Why is a third person, who asked no question upon the subject, and gave no notice of his having any interest in the matter, to tell the trustees that it was their duty towards him to have called in the debt sooner, and that they are not now to be permitted to resort to any means which they may have in their own hands, of satisfying any portion of that debt? Nobody could take an assignment of Mr. *Hunt*'s interest under the settlement, without seeing the covenant for the payment of the 4000*l.* Now the person proposing to take the assignment could ask the trustees whether that money was paid: but the trustees had no opportunity of apprising him that it was not paid; for they knew nothing of the transaction. They have been guilty of no bad faith towards the plaintiffs: but the plaintiffs have been wanting in common prudence in not consulting the trustees before they took the assignment. It was surely a rash conclusion, that the money must necessarily have been paid, because the period of payment was past. But did the annuitants really believe that this money was paid? They were evidently getting from Mr. *Hunt* the security of every fund he could give them. If the 4000*l.* had been paid, it would have been invested, and additional dividends would in all probability have been included in the security.

However,

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However, it is enough that the trustees have done nothing to mislead the plaintiffs, or to forfeit the right, which originally they had, of applying Mr. *Hunt*'s dividends to the satisfaction of Mr. *Hunt*'s debt. I presume, there is no question, that the dividends received prior to Mr. *Hunt*'s death are insufficient to satisfy the debt; and therefore the bill must be dismissed. (*a*)

(*a*) Reg. Lib. B. 1816. fo. 1679.

ROLLS. *March* 5. *April* 28.

CHRISTOPHER ALDERSON LLOYD, KITTY ALDERSON LLOYD, MARGARET LLOYD, and EMMA LLOYD - - PLAINTIFFS;

AND

JOHN BRANTON, JOHN PEARSON, CHRISTOPHER ALDERSON HARKER, and W. P. BARNARD and SARAH his Wife DEFENDANTS.

Testator gives 24,000*l*., upon trust, as to 6000*l*. to pay the interest to *S. B.* (his niece) during her life, and, after her decease, the principal among her children; if she should die without issue, over. He declares similar trusts as to three other sums of 6000*l*. (making the remainder of the 24,000*l*.,) for his three other nieces and their children. Proviso, that, in case any of his said nieces should marry without such consent as therein prescribed, each, &c. so marrying, should forfeit the interest of her 6000*l*., and all other sums to which she may be entitled under his will; and the respective sums of 6000*l*., and all such other sums, &c. should fall into his residue. And he gives the residue in trust for his two nephews and their children—in case of the death of either without issue, his moiety to go over to and be divided among his said nieces.

Afterwards, by codicil, he gives to each of his nieces 2000*l*. in addition, "subject to the same powers, provisos, directions, and limitations, "as are contained in the will respecting the sums of 6000*l*." *S. B.* who

CHRISTOPHER ALDERSON, by his will, dated *July* 24, 1810, gave and bequeathed to the defendants, *Branton*, *Pearson*, and *Harker*, 24,000*l*. upon

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who was of age at the date of the will, marries without the consent required.

Held, a forfeiture; extending not only to the future interest of her 6000*l.*, but to the capital, and also to the 2000*l.* given by the codicil, and to a fund set apart to answer an annuity, to which *S. B.* would otherwise have been entitled on the death of the annuitant. Whether the forfeiture would also extend to her share of the residue, in the event of the contingency upon which it is given over to the testator's nieces, *quære.*

upon trust, as to 6000*l.* (part thereof) to invest the same in their names, or in the names or name of the survivors or survivor, his executors or administrators, upon government or real securities, and to pay the dividends or interest to his great niece the defendant *Sarah Barnard* (then *Sarah Alderson* spinster) by half-yearly payments, during her life, and after her decease to transfer and pay the capital unto and amongst her children as therein mentioned; and, in case she should die without issue, then upon trust for her brother the defendant *Harker*. Similar trusts were declared as to three other sums of 6000*l.* each (residue of the said sum of 24,000*l.*) for the benefit of the testator's three infant great nieces, (the plaintiffs *Kitty Alderson Lloyd*, *Margaret Lloyd*, and *Emma Lloyd*,) and their children; and the testator directed that his four great nieces should have and be entitled to the dividends and interest of the said respective sums of 6000*l.*, and to all and every sum and sums of money which they should respectively have or become entitled to under his will, for their respective sole and separate use. The testator then declared it to be his will that his trustees, or the survivors, &c. should pay and apply any part of the dividends or interest payable to such of his said great nieces as should at the time of his decease be under the age of twenty-one years, in or toward her or their respective maintenance, &c., or otherwise, until she or they should respectively attain the age of twenty-one years, or be married with such consent as thereinafter mentioned, as his said trustees should in their discretion think proper. The testator also gave to his said trustees an annuity of 50*l.* for the life of his niece *Jane Harker* (the defendant *Sarah Barnard*'s mother) upon trust to pay the same to his said niece for her life; and he directed that a sufficient part of his personal estate should be invested for securing the said annuity, and

that

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that his trustees should stand possessed of the funds in which the same should be invested, from and after the decease of his said niece, upon trust for her daughter *Sarah Barnard*. The will contained also a specific bequest of books and other articles to *Sarah Barnard;* and there then followed a proviso that, in case of the marriage of any of the testator's four great nieces with the consent of his said trustees, or of the trustees and executors for the time being of his will, in writing for that purpose given, but not otherwise, his said trustees or the survivors, &c. should pay to each of his said great nieces so marrying, or otherwise settle upon her, or her issue, in such manner as they in their discretion should think adviseable, the sum of 2000*l.*, to be raised and paid out of the 6000*l.*, to the dividends and interest whereof his said great niece so marrying was under his will entitled for her life as before mentioned; and another proviso, that if any of his great nieces should marry without the consent of his said trustees or trustee for the time being, testified by writing under their or his hands or hand first given, then and in such case his said great nieces, each and every of them so marrying without such consent, should, from thenceforward, forfeit, and be no longer entitled to, the dividends or interest of the respective sums of 6000*l.* payable to them respectively for life as before mentioned, or to any other sums which they might respectively become entitled to under his will, and should not have received; and that the said interest and dividends, and the respective sums of 6000*l.*, or the securities for the same, and all such other sums to which they respectively might become entitled as aforesaid, should thereupon sink into, and constitute part of, the residue of his estate. And he gave and bequeathed the residue of his said estate and effects unto his said trustees, upon trust to invest the same upon Government or real securities, and to pay to his great

great nephews, the plaintiff *Christopher Alderson Lloyd* and the defendant *Harker*,) the dividends or interest of the same, in equal shares, for their respective lives; and after the decease of either, as to one moiety, upon trust for his children; or in case either should die without leaving issue, then upon trust to pay the dividends or interest of his moiety to the testator's four great nieces, share and share alike, during their respective lives; and after the decease of any and each of them, as to one fourth part of the said moiety, upon trust for the child or children of her so dying: but in case any of them should die without leaving issue, then upon trust for the survivors of his said nieces, and the respective issue of any that should be dead, in equal shares.

By a codicil to his will, dated the 14th of *December* 1810, the testator revoked the said legacies of 6000*l.* to his great nieces, and gave to each of them 5000*l.*, to be invested in like manner as directed by his will as to the 6000*l.*; and directed that the dividends or interest thereof respectively should be paid to his said nieces for their respective separate use, and that the legacies of 5000*l.* each, and the dividends or interest of the same, should be subject to the same trusts, conditions, powers, provisos and directions, as by his will declared concerning the legacies of 6000*l.*

By another codicil, dated the 20th of *December*, 1810, he gave to each of his grand nieces 2000*l.* in addition to what he had before given them, and directed that the same should be invested in the names of his trustees, and the dividends and interest go and be paid and payable to his said nieces respectively, and their respective children, subject to the same powers, provisos, directions, and limitations, as contained in his will

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will respecting the 6000*l.*, except as to the payment of 2000*l.* on their respective marriages.

At the death of the testator, which happened in 1810, the defendant Mrs. *Barnard*, (then *Sarah Alderson*, spinster,) was twenty-six years of age, and shortly afterwards she married the defendant *W. P. Barnard*.

On the hearing of the cause it was referred to the Master to enquire (among other things) at what time, and under what circumstances, the marriage took place, what was the age of Mrs. *Barnard* at the time of the marriage, and whether the same was had with such consent as required by the will of the testator. The Master by his Report certified the facts of the case accordingly, from which he found that the marriage was not had with such consent as aforesaid. The Report was not excepted to, and, the cause now coming on for further directions, the question was, whether, in consequence of such marriage without consent, a forfeiture had been incurred of all or any of the bequests to Mrs. *Barnard* contained in the will and codicils.

Bell and *Palmer*, for the defendants Mr. and Mrs. *Barnard*, contended against the forfeiture, upon two grounds, *first*, that there was no sufficient bequest over, and *secondly*, that the condition could not be held to extend to a marriage without consent after the party had attained the age of twenty-one.

I. It is a clearly established rule, that, in the case of a legacy liable to be defeated by a condition subsequent in restraint of marriage, where there is only a general residuary bequest, that is not sufficient to support the condition; which is void, as being held *in terrorem*, unless there is a good bequest over of the particular

cular legacy. This point was regarded as settled by *Lord Thurlow*, as appears from the written judgment pronounced by him in *Scott* v. *Tyler* (*a*).

There are two cases exactly in point with the present, as to a mere declaration that the legacy shall sink into the residue on the condition happening not being sufficient to alter this rule. The first is a case cited by the Master of the Rolls in *Reves* v. *Herne* (*b*); the other, the case of *Garrett* v. *Pritty* (*c*). In *Harvey* v. *Aston* (*d*), indeed, it is said by Mr. Justice *Comyns* that it was held otherwise in *Amos* v. *Horner* (*e*), which was a later case than *Garrett* v. *Pritty*, and appears by him to have been regarded as over-ruling the last mentioned case. But *Amos* v. *Horner* was never decided (*f*). If

(*a*) Dick. 712. Vid. p. 723. "The will before us contains a residuary bequest; but that has been repeatedly and well enough determined to leave the conditional legacy in *statu quo*: it only prevents that which has not been disposed of already, whatever be its amount, from falling by order of law, to the executor or next of kin."

(*b*) "Where a legacy was given upon such condition of marrying with consent, and, if not, that it should sink into the residue of the testator's estate, which he gave to *I. S.* it was held, that though the marriage was without the consent, yet the legacy was not lost; because it would have been the same if the testator had said nothing about its sinking into the residue, and therefore was construed only *in terrorem*." 5 Vin. Ab. 343. tit. *Condition*, Z. d. pl. 41.

(*c*) 2 Vern. 293. "The Court decreed the legacy with interest, principally because it was not *expressly* devised over, but to fall into the residue."

(*d*) 1 Atk. 361.

(*e*) 1 Eq. Ab. 112. Forr. 216.

(*f*) "In *Amos* v. *Horner* the Master of the Rolls thought that a residuary disposition was enough: but it seems that no resolution was made, as the case went off for want of parties, and never came on again, and it has been considered of no authority by subsequent Judges." Roper on Legacies, Vol. I. p. 326.

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the cases above cited are law, (and it has never been determined otherwise,) the present is clearly within them: but if it should be held, notwithstanding these cases, that the mere direction that, on the happening of the condition, the legacy shall fall into the residue, is sufficient to form an exception to the rule of the civil law that such a condition is void, as operating only *in terrorem*, we have then to consider how this condition is to be construed with reference to the particular circumstances of the case.

II. The clause of forfeiture on marriage without consent must be construed to relate to the time when the legacy would become vested. *Pullen* v. *Ready*, 2 Atk. 587. In this case, it is declared that, by marriage without consent, the legatee shall forfeit, not only one particular legacy, but all the benefits intended her by the will. Now, by the will, she takes, besides the legacy of 6000*l*., and the additional 2000*l*. given by the codicil, a specific bequest of books and household furniture, an annuity of 50*l*. after the death of her mother Mrs. *Harker*, and lastly her contingent share of the residue. In this case, therefore, there are different times appointed for the vesting of the several legacies, all of which are to become forfeited on the same event happening; and, where there are different times for vesting, it seems reasonable to fix upon a certain limited period as that to which the condition is meant to be restricted, and then there is no period so obvious as that of legal competency. If not to the age of twenty-one, to what other period could the condition be limited? A condition in restraint of marriage under twenty-one, even where there is no gift over, is held a reasonable and good condition; because it imposes no other restraint upon the liberty of marriage than was before imposed by the law of the land. If otherwise, this is a condition in restraint of marriage *generally*, which

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is within the policy upon which the exception to the rule of the civil law is founded. Thus, in *Stackpole* v. *Beaumont* (*a*), Lord *Loughborough* says, "I am perfectly free in this Court, in a case where the condition "only operates up to the age of twenty-one, and requires no more than the general policy of the law "and course of the Court hold to be proper, to say "there is nothing illegal in such a condition.—Confined to such cases, where the restraint operates only "up to the age, till which, by the law and policy of the "country, consent is necessary, I have no difficulty to "say, there is no authority to lead the Court to pronounce a proposition so repugnant to that law, as that "such a condition is invalid." And see *Reynish* v. *Martin* (*b*), and cases there cited. See also *Fry* v. *Porter* (*c*), *Semphill* v. *Bayley* (*d*), *Elton* v. *Elton* (*e*), *Knapp* v. *Noyes* (*f*), where Lord *Camden* said, "It is "very unnatural for a parent to impose a consent to "marriage during his daughter's whole life;" and he held that, in that case, "the condition of marriage with "consent must mean, at an earlier time than twenty-"one." So *Osborn* v. *Brown* (*g*), where the legacy was made payable within twelve months after the testator's death, but, if the legatee should marry a certain person, then the legacy was revoked; and the legatee having married that person after the twelve months had expired, it was held the legacy vested at that period, and the condition referred only to the time of the vesting

If it be said that, in this case, there was no time appointed for the vesting of the principal legacy, yet those bequests, which were made payable immediately, must be

(*a*) 3 Ves. 89. see p. 97.
(*b*) 3 Atk. 330.
(*c*) 1 Mod. 86, 300.
(*d*) Pre. Cha. 562.
(*e*) 3 Atk. 504, 1 Ves. 4. 1 Wils. 159.
(*f*) Ambl. 662.
(*g*) 5 Ves. 527

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held to have vested accordingly, and the condition, as to those, to have reference only to the period of vesting. And in this respect the additional sums given by the codicil are so circumstanced, and the condition must therefore be held not to apply to them, whatever it may do as to the sums of 6000*l*.

The MASTER *of the* ROLLS.

It is too late to raise a doubt on the *legality* of the condition on which the right of *S. B.* to the bequests under the will is made to cease.

It is now too late to raise a doubt on the legality of the condition on which Mrs. *Barnard*'s right to the bequests given her by the will is made to cease.

In the modern case of *Dashwood* v. *Lord Bulkley*(a) the validity of such a condition does not seem to have been considered as at all open to controversy, although it was not confined to marriage under twenty-one.

Then the question is only upon the import and effect of the condition which the testator has in this case imposed.

When a legacy is to vest, or be paid at a particular age, and there is a clause of forfeiture on marriage without consent, the Court will construe it as having relation to a marriage under the specified age. But where

It was contended, in the first place, that, in fair construction, it may be understood as applying only to a marriage under the age of twenty-one. When a legacy is to vest, or be paid, at a particular age, and then there is a clause of forfeiture on marriage without consent, the Court, I agree, will construe such clause as having relation to a marriage under the specified age. But there is nothing in this will which can make that doctrine applicable to the case of Mrs. *Barnard*. The testator has not, with regard to her, spoken of twenty-one, or of any other age or period, at which the bequests made to her were to take effect. He does make some specific provision with respect to the event of any of his grand-nieces being

(a) 10 Ves. 230.

under

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under the age of twenty-one at his death—and, with regard to them, the argument might have some application: but Mrs. *Barnard* was above that age before the will was made, and yet the testator has thought proper to include her in the condition, by extending it to all his grand-nieces. The bequests to her vested at the testator's death, liable to be devested by her marriage without consent.

no age is specified, *quære* if the Court can limit the condition to a marriage without consent under twenty-one. Clearly not, where the party so marrying was above twenty-one at the date of the will.

As the condition in this case is certainly a condition subsequent, it was contended, in the next place, that, without a devise over, it can produce no effect, and that here there is nothing which can be considered as a devise over in the event of a breach of the condition.

A subsequent condition of forfeiture on marriage without consent, where there is no devise over, will not be enforced. The reason of this rule is differently assigned—either because the bequest over affords a manifestation of intention that the condition is not merely *in terrorem;* or on account of the interest of the legatee over.

Whatever diversity of opinion there may have been with respect to the necessity of a devise over in the case of conditions precedent, I apprehend that, without such a devise, a subsequent condition of forfeiture on marriage without consent has never been enforced. Different reasons have been assigned by different judges for the operation of a devise over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of forfeiture merely *in terrorem*, which might otherwise have been presumed. Others have said that it was the interest of the devisee over which made the difference, and that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation, to which the Court was bound to give effect. Whatever might be the ground of decision, it was held that, where the testator only declared that, in case of marriage without consent, the legatee should forfeit what had been before given, but did not say what should become of the legacy, such declaration would remain wholly inoperative.

Whether *a mere residuary bequest* amounts to a disposition of the legacy, *quære*. But, where the tes-

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tator declares that, on the happening of the condition, the legacy shall fall into the residue, that is an express disposition over.

Whether a mere residuary bequest amounted to a disposition of the legacy, has been matter of much controversy. In *Harvey* v. *Aston* (a), *Lord Chief Justice Willes*, and *Lord Chief Baron Comyn*, held that it did. Lord *Hardwicke* did not there express any opinion on the point —but in the subsequent case of *Wheeler* v. *Bingham* (b), he decided that a residuary bequest was not such a devise over as the rule required. The case of *Scott* v. *Tyller* (c) has been sometimes considered as a contrary decision. But it appears from the copy of Lord *Thurlow*'s judgment in *Dickens*, that he thought it had been properly held that a residuary bequest left the conditional legacy in *statu quo*, and that the ground of his decision was, that Mrs. *Scott* never came under the description to which the gift of the 10,000*l*. was attached. In the present case, there is a direction that the forfeited bequests shall sink into and constitute part of the residue therein afterwards bequeathed. It does not rest therefore on a mere declaration of forfeiture. There is an express disposition made of what is to be forfeited. It was said that a direction that it shall fall into the residue is no more than the law would imply, and cannot therefore amount to a bequest over. But when it was decided that a residuary clause did not carry such a legacy, it was by consequence decided that it did not fall into the residue—for if it did, the residuary legatee would be entitled to it. What is here declared is, that that residue which is thereinafter given shall include in it the legacies declared to be forfeited. In the case of *Wheeler* v. *Bingham* (d), Lord *Hardwicke* held that there was a clear distinction between a mere residuary bequest, and a direction that the legacy should sink into and constitute a part of the residue. And the contrary had not been decided in *Garrett*

(a) 1 Atk. 375.
(b) 3 Atk. 364.
(c) 2 Bro. 431. 487. Dick. 723.
(d) 3 Atk. 364.

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v. *Pritty* (*a*); for the will contained no such direction, and the decree could not therefore proceed on the ground stated by the reporter (*b*).

I am of opinion that there is in this case a valid devise over; and, as the marriage appears by the master's report to have been had without consent, it follows that the forfeiture takes place. And there is no question but the forfeiture extends, not only to the future interest and dividends, but to the capital of the principal legacy, and likewise to the fund directed to be set apart to answer the annuity to the mother of Mrs. *Barnard*, to which the daughter would otherwise have been entitled at her decease.

It is impossible to make any distinction as to the 2000*l.* given by the codicil. For that is given subject to the same powers, provisos, directions, and limitations, as are contained in the will with respect to the 6000*l.* It is by a proviso that the forfeiture is declared; and to that proviso the 2000*l.* must be subject, as also to the direction that the forfeited shares shall sink into the residue.

It is unnecessary to say whether Mrs. *Barnard* would be excluded from a share of the residue, if the contingency on which it is given to the grand-nieces should happen. It may never happen, and therefore there is no question upon it which the Court ought at present to decide.

(*a*) 2 Vern. 293.

(*b*) It having been suggested by *His Honour* that the decree in the case of *Garrett* v. *Pritty* could not, for the reasons assigned, have proceeded on the ground assigned by the reporter, I have consulted the register's book, and find that, although no reason for the decree is there stated, it may

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rather be inferred from the circumstances (which are very peculiar) that the case really turned on the *subsequent approbation* of the person whose consent was required, (as in *Pollock* v. *Croft* (a), and others of that class of cases there cited,) coupled perhaps with the ignorance of the party as to the restriction in her father's will, and the suspicious conduct of the son, to whom the legacy would otherwise have gone over by virtue of the residuary clause. It will be observed that the condition was a condition subsequent.

The material circumstances of the case were as follows:

"Reg. Lib. 1692. A. fo. 821.

John Garrett, and *Eliz.* his wife, - - - - - Plaintiffs.

John Pretty, (Executor of *Richard Pretty*, deceased,) *Joseph Scriven*, *Henry Nesbit*, and *John Peirson*, - - Defendants.

"The testator, (who was the father of the plaintiff *Elizabeth* and of the defendant *John Pretty*,) by his will, after appointing his son (the defendant) sole executor, and the defendant *Scriven*, and another, *overseers* thereof, bequeathed to the plaintiff *Elizabeth* (then *Elizabeth Pretty*, spinster,) 3000*l.* to be paid to her in manner following: that is, 2000*l.* (part thereof) when she should attain twenty-one or upon her day of marriage, which should first happen after his (the testator's) decease, and 1000*l.* (the remainder) at the end of two years after her attaining such age or her marriage, which should first happen. But, in case she should die before attaining her age of twenty-one or marriage, then he gave all the said 3000*l.* to the defendant her brother. He further willed that, until her said legacy should become due and payable, she should have, for her maintenance, the sum of 40*l.* *per annum*, and he directed *Scriven*, "as he had been an extraordinary kind friend to "him, to continue his love and kindness towards his child- "ren, in advising and directing them in their whole con- "cerns; and thereby obliged the plaintiff and her brother "to follow his advice and counsel in all things." Then followed the clause, "that, if, and in case, the plaintiff should "be married before she attained twenty-one, without the

(a) Ante, Vol. I. p. 181.

"consent

"consent of his said worthy good friend, (in case he be "then living,) then the legacy of 3000*l.* before given to her "should cease and be void, and in lieu thereof he gave to her "500*l.* only."

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The Bill, after setting forth so much of the will, proceeded to state that, after the testator's death, the plaintiff, with the knowledge and at the desire of her brother, went to reside with the defendant *Peirson*, who was their nearest relation, and, while at his house, a marriage was treated by *Peirson* with her present husband, the other plaintiff, whom she married accordingly. That the plaintiffs had applied to her brother, as executor, for payment of the legacy, which he refused, pretending that the marriage was had without *Scriven*'s consent, and that the plaintiffs knew of the proviso in the will; whereas the plaintiffs charged that they were kept in ignorance of the proviso till after their marriage, "which was done with the greater haste to avoid the importunity of the defendant *Pretty*'s wife's near relation, "whose fortune was far inferior to the plaintiff's portion, "and against whom she was wholly advised." That she had been often told she had 3000*l.* for her fortune, and might marry whom she liked. That *Scriven* "was afterwards consenting, and rejoiced that she had escaped the "defendant's wife's said relation." The Bill then insisted, "that if any formal assent of *Scriven* be wanting, as is pretended, yet, having taken the advice of the relations she "was placed with her at her brother's request, the plaintiffs "were nevertheless entitled to their legacies *by the Justice of* "*the Court*."

The defendant *Pretty*, by his answer, did not deny that the plaintiffs were ignorant of the clause in the will till after their marriage; but he said that, the will having been proved in the Prerogative Court of Canterbury, they *might have* resorted to it for information as to its contents; "and "he doubts not that the plaintiff *John* perused the same, "he being a scrivener, and a man in years, and versed in "business, and the words of the will being very plain and "express." He insisted that by the will the testator had given to him (the defendant) all the rest and residue of his estate; that the plaintiff's maintenance of 40*l.* per annum determined

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determined by her marriage; and that, as to the principal legacy, "in regard they had intermarried without the know-"ledge or approbation of *Scriven*, therefore the legacy ceased "and became void, and 500*l.* was due in lieu thereof, which "he was ready to pay, and prayed it might be disposed of for "his sister's best advantage."

The defendant *Scriven* said that the testator having made him overseer of his will, he was always ready to give the best advice and assistance to the infants — that, after the testator's death, he took the plaintiff Elizabeth home to his house, intending to have the care of her person, but was disappointed by the improvident marriage of the defendant *Pretty*, who, being then an apprentice not yet out of his time, within a month after his father's death was prevailed on to marry one *Judith Pattle*, and, together with his wife's father, took possession of the property, and managed it themselves; whereupon he (*Scriven*) told them, "that, since "they had got the plaintiff's portion into their hands, it "would be convenient they should also have the care of "her person;" and she was then accordingly removed to *Pattle*'s house. — That *Pattle*, "having a son *towards the* "*law*," designed to marry him to the plaintiff, and that the plaintiff was importuned by her brother's wife for that purpose; but he (*Scriven*) was not consulted in it, and, if he had, "believes he should not have consented." That the plaintiff was afterwards removed to *Peirson*'s house, as he believed, by her brother's consent; and that, "the day after "her marriage, *Peirson*, together with the defendant *Pretty*, "came to his (*Scriven*'s) house, and acquainted him there-"with, at which he was surprised, but said, since she had "married without his consent, he was very glad she had "disposed of herself to so worthy a person, whom he had "known so long; having done much better, in his judgment, "than her brother, whom he had reproved for marrying with-"out his consent, telling him it might be an example for his "sister to follow."

The defendants *Peirson* and *Nesbit* also spoke of the design formed by *Pattle* to marry his son (an attorney) to the plaintiff, "in order whereto it was contrived that this "son should go along with the defendant *Pretty* into the

"*West*

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"*West Country*, and make some excuse and leave him, and "return to marry the plaintiff before her brother should "come to town; but *Pretty* having intimation of the plot, "and by experience knowing that *Pattle* was not capable of "giving his son any thing answerable to his sister's fortune, "before his journey desired *Peirson* that his sister might "be kept at his house, to avoid any such attempt, declaring "his aversion and his sister's dislike to it.—That young "*Pattle* wrote a letter of love to her on the journey; but "plaintiff understanding the plot, removed herself to *Peirson's* house, where the marriage soon after took place.

Peirson said further that *he* knew nothing of the clause of restriction in the will, "being that *Pattle* the father declared, her portion was 3000*l.*, and none could hinder her "from it. That *Scriven*, when the defendant *Pretty* complained of such design, declared that, if *Pattle's* son "should marry her, he would have her portion whether "they would or no." He added that the testator had a far greater love for the plaintiff than for her brother.

The Court declared that the plaintiffs were well entitled, notwithstanding the clause of restriction, to the legacy of 3000*l.*; and ordered that the defendant *Pretty* should pay the same with interest on 2000*l.* since the marriage; referring it to the Master to compute interest thereon, and also what was due to the plaintiff for maintenance until the marriage, and to look into the settlement made on her marriage, and, if he should find it to be not answerable to her fortune, to see that a proper settlement might be made by her husband.

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July 28.

SIR EDWARD KNATCHBULL, Bart. and DAME MARY his Wife, HENRY CURSON and BRIDGET his Wife, GEORGE DE BILLINGHURST and ANN his Wife, HENRY MICHAEL GOOLD and ELEANOR his Wife, PLAINTIFFS;

AND

STEPHEN HENRY GRUEBER, DEFENDANT.

[This case was very fully argued before the Lord Chancellor at different times, both on the general doctrine of the Court as to the execution of a contract with compensation for a partial defect of title, and on the particular circumstances of the case itself: but, from the view which his Lordship has taken of it, it seems unnecessary to report those arguments.]

The LORD CHANCELLOR.

On a bill by vendor, for specific performance, with an allowance to the defendant by way of compensation for a part of the estate to which the plaintiff is unable to make a good title; the defendant having taken possession under the agreement, one of the terms of which was "that immediate possession should be given;" and, in the course of disputes which arose subsequently as to the title to this part of the estate, having been turned out of the possession so taken; *held*, that the vendor, in so turning him out of possession, has abandoned his right to a specific performance; and the bill dismissed accordingly: without going into the question as to the materiality of the defective part.

THIS case (*a*) comes before the Court upon an appeal from a decree pronounced by the Vice-Chancellor.

It appears by the bill, that, in *October* 1811, the plaintiffs, who were seised of the estate in question, had

(*a*) Reported, 1 Madd. 153.

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proposed to sell it by auction, in lots, as described in the printed particular, and under certain conditions. The particular, (which was referred to in the contract afterwards entered into between the plaintiffs and defendant,) pointed out a somewhat more prudent mode of dealing between the vendors and any person who should happen to become the purchaser at the auction, than seemed to be afterwards thought of in framing the contract, of which this bill seeks the performance. By that particular the property was distinguished into three lots, the first of which was represented as a valuable freehold estate, containing a spacious mansion-house and several pieces of land—some of them (as, I now understand, is admitted on all hands) forming a part of the estate called *Cole Nash* (a circumstance which seems not to have been ascertained to the satisfaction of both parties when the bill was filed): the second of which lots was described under the name of *The Manor-Farm*, but which, in the proceedings, is denominated *The Stone-Stile Farm*, and is part of the premises afterwards sold to *Wildman:* and the third is called *Marsh Land*, and is described as distinct from all the rest of the property, and as constituting the third lot entirely by itself.

This sale by auction, however, being intended to take place only in case the estate should not be sold by private contract, it is admitted that an agreement was entered into on the 15th of *October*, 1811, between the plaintiffs and defendant, for a sale of the estate to the defendant: but it was nevertheless agreed (and I now mention the circumstance because the bill alleges that it was at the suggestion of the defendant, who wished to become purchaser of a part only, and not the whole of the property; while the answer insists, as I think is also established in evidence, that it was not at the instance of the defendant, but of *Sir Edward Knatchbull*;) that

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that the estate should still be made the subject of a sale by auction, notwithstanding the contract.

It is necessary to attend very particularly to the terms of the agreement so entered into between the parties. It begins by stating, that the plaintiffs (parties to the agreement of the first part) "have sold by private contract to the (defendant) for 52,000*l*., and the (defendant) hath agreed to purchase for that sum, the fee-simple of estates of the late Mr. *Hawkins*, advertised to be sold by auction at *Feversham* on the 16th inst. in three lots, including the timber and underwood, free from all incumbrances, except the quit-rents and reliefs, the land-tax, the existing lease of *Stone-Stile Farm*, and the other incumbrances set forth in the printed particulars of sale. That the (defendant) shall pay Mr. *J. Humphries* (the agent of the vendors) on the execution of this agreement, as and by way of deposit, the sum of 5000*l*., to be paid to the vendors on the title being approved of; the sum of 12,300*l*. to the vendors on the 1st of *February* next; the further sum of 17,300*l*. to the vendors on the 1st of *August* next; and the sum of 17,400*l*. (being the remainder of the said sum of 52,000*l*.) on the 29th of *September* next; with interest upon the unpaid instalments, from the date of this agreement, until paid, after the rate of 5*l*. per cent. per ann."

Then follows this part of the agreement—and a very material part in my view of the case, it is—"That the (defendant) shall have immediate possession of the mansion-house, gardens, and back-orchard at *Nash*, and also of the wood-land and marsh-land on hand, and shall receive the rents of *Stone-Stile Farm*, and of the farm at *Nash*, and other parts of the estates, which are let, *from Michaelmas day last*, to which

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"time all outgoings shall be paid by the vendors; but "the vendors shall retain possession of the title-deeds "until the above consideration money and interest shall "be fully paid, and the purchase completed; and, in "the mean time, the unpaid part of the consideration "money shall stand charged and secured upon the "estate."

The first of the terms of this agreement therefore is, that immediate possession shall be given to the purchaser; and then follows this stipulation:—"That the "taking possession, and receipt of the rents, shall not "be considered as an acceptance of the title: but the "(defendant) shall, notwithstanding, have a good and "marketable title made out to him."

The agreement then goes on:—"That the vendors "shall, at their expence, forthwith furnish to (the de-"fendant) an abstract of the title to the estates, and "make out a good and marketable title to the same, "free from incumbrances. That this agreement shall, "on or before the 1st of *February* next, be carried into "execution by such conveyances and assurances as shall "be advised by and on behalf of the (defendant), and "such part of the purchase-money as shall remain un-"paid shall be secured according to the intent of this "agreement, in such manner as shall be advised and "approved by *C. Butler* of *Lincoln's Inn*, on the part of "the vendors, and by *G. Cooke*, of the *Temple*, on the "part of the (defendant). That the expenses of all "fines and recoveries (if any necessary), and the mak-"ing out the title, and such other expenses as are "usually paid by vendors upon sale by private contract, "shall be borne by the vendors; and the expenses of "the conveyances and such other deeds as shall be "deemed necessary for securing the payment of the in-

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"stalments shall be borne by the (defendant). That "the (defendant) shall, if he thinks proper, have the "furniture and fixtures in and about the mansion-"house, upon paying for the same according to valua-"tion, in the usual way; otherwise the said furniture "and fixtures shall be forthwith removed from the pre-"mises. That the sale of the estates shall take place "as advertised; but the same shall be bought in on the "part of the vendors; and, if any part is sold, such sale "shall be on the account and at the risk of the (defend-"ant), as well in respect of the auction duty (if any "shall be incurred) as in all other respects, except with "regard to the expenses already incurred, by advertis-"ing, by catalogues, and for the commission of the "auctioneer; and, if by any accident or oversight, the "auction duty for what is bought in shall become pay-"able, it shall be referred to two persons, one to be "chosen by the vendors, the other by the (defendant,) "to consider and decide by whom the said auction "duty shall be borne,—whether by the vendors, or "by the (defendant); and, in case they differ, the "arbitrators shall choose an umpire, whose decision "shall be final. That, upon the delivering up of *Nash* "*Farm* by the present occupier, who is tenant at will, "such part of the stock and crop as is usually taken by "landlords shall be taken by the (defendant) at a "valuation according to the custom of the country. "That, if the (defendant) shall neglect or fail in "the above agreement, the deposit of 5000*l.* shall "be forfeited, and the vendors be at liberty to resell "the estate, either by private contract or public auc-"tion, and the deficiency of the aforesaid sum of "52,000*l.* on such sale (if any), together with all "charges attending the same, shall be made good by "the (defendant). That, in case the (defendant) shall "sell either of the said lots at the present auction, the "auctioneer's

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" auctioneer's commission on such lot or lots shall be " paid by the (defendant); and, in that case, the " vendors hereby agree to convey such lot or lots to the " (defendant,) or the purchaser or purchasers, on pay- " ment to the parties of the first part, of the sum or " sums of money for which the same shall be so sold, in " payment *pro tanto* of the aforesaid instalments. That " the vendors shall join in all such notices to quit, or " to repair, as shall be required by the (defendant) to " be given to the tenants of the estates." And it is signed in the usual manner.

It was intended, then, by this agreement, that the sale by auction should take place, and that at such sale the estate should be dealt with as being divided into three lots, which may be called, for distinction, *Nash Court* (including *Nash Farm)*, *Stone-Stile Farm*, and *Marsh Land.*

In the first of these lots, as I understand, are included the twelve acres which constitute *Cole-Nash*. It appears from the evidence that *Cole-Nask* had been purchased by Mr. *Hawkins* (the ancestor of the plaintiffs) in 1770, not only with a very imperfect title, but without the pretence of a marketable title: and, if the papers and title deeds of the estate had been looked into at any time before the sale by auction, they would have furnished the means of ascertaining that fact. It is quite clear that the vendors themselves knew nothing of their title to *Cole-Nash*, whatever they may have known as to that which they possessed to the rest of the premises,— not only, that they were ignorant of the nature of their title to it, but that they could not tell where *Cole-Nash* itself was to be found; as to which, even now, many years after the date of the agreement, they state that certain parts of the park were pointed out as constitut-

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ing that property, though nothing can be more clear than that no part of that property is situated in the park, but that its true situation is as I shall presently describe it to be.

The deposit stipulated by the agreement was paid. The defendant, who had the option of taking the furniture, declined it; and, shortly afterwards, upon a question arising, by which party the taxes were to be paid, Sir *Edward Knatchbull* was required to take away the furniture, which he did, but not "*forthwith*," according to the express terms of the agreement. However, as he did remove it, no inference is to be drawn from his not having done so "*forthwith*," as was there stipulated.

The sale by auction took place; and Mr. *Wildman* became the purchaser of the *Stone-Stile Farm*, at a price which, together with the value of the timber, amounted to 11,900*l*. The defendant's concurrence in this purchase (which purchase could not be completed without that concurrence) is held out by the bill as a proof of his acquiescence in the title, which was the same to *Stone-Stile Farm* and to the other parts of the estate, except *Cole-Nash*: but, as far as I am able to collect from the answer and the evidence in the cause, the defendant's concurrence cannot be stated to amount to more than a concurrence in that single act, with an express protest that it should be without prejudice to any objection he might himself have to the title.

The bill proceeds to state that the defendant treated the estates as his own, with such title as the abstract discloses, and that the mansion-house and garden are still in his possession—not saying, however, that any other parts of the estate are in his possession—but alleging, nevertheless, that he treated the whole as his own,

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own, and had made a map of it as of his own estate. The plaintiffs also insist that a good title can be made to the whole—or, if not to the whole, at least to all except about twelve acres, "in respect of which, if the "defendant is entitled to avail himself of any objection, "a reasonable deduction or abatement may be made "from the purchase money;" that the agreement has never in any manner been waived or abandoned, but is a good and binding agreement, and ought to be carried into execution—and that, upon the defendant's refusal to comply with their proposal of a reference to arbitration, they served him with a notice that they (the vendors) were in a situation to deliver possession to him agreeably to the contract, and required him forthwith to place his purchase money in Exchequer bills, there to remain pending the proceedings which his refusal had rendered necessary—but neither had he complied with that last requisition. This notice is dated the third of *November*, 1812; and the date is material, because I do not find, throughout the bill, any statement of the transactions which took place between the parties, as to taking or retaking possession, or with relation to the correspondence, from the time of the execution of the agreement, to this 3d of *November*, 1812. All that is put in issue by the bill is, that the defendant never made any objection to the title, except to this small piece called *Cole-Nash*—that this small piece "is separate and detached from the rest of the estate, or may "be separated from it without any material inconvenience or injury; being a plot of ground on which "there is no building whatever, and lying without the "gates or inclosure of *Nash Court*, the principal mansion-house and estate, consisting of about 320 acres, "and from which it is entirely divided by a road." The prayer of the bill, therefore, is, for a specific performance of the agreement, and an account and pay-

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ment of what remains due for principal and interest of the purchase money—"and, if the Court shall be of "opinion that the defendant is not bound to take the "twelve acres called *Cole-Nash*, then that it may be "ascertained how much ought to be allowed him by "way of deduction out of his purchase money in respect "of such premises, and that the same may be allowed "him accordingly in taking the account."

To this bill the defendant has put in an answer, the substance of which it is difficult to state shortly, because, having reference to all the correspondence which took place, that correspondence must be treated as part of the answer itself, and it is impossible to come at any true knowledge of the nature of this transaction, without going at great length into the facts which that correspondence discloses.

After admitting the agreement, and payment of the 5000*l.* as a deposit, the defendant represents that he declined to take the furniture and fixtures in and about the mansion-house, according to the option given him by the agreement, and gave notice to the plaintiffs, or their agents, that, if he (the defendant) became liable to any taxes in consequence of the same remaining on the premises, he should consider the plaintiffs as liable —but did not otherwise insist on the removal; and the same had since been disposed of. He then states the sale by auction, and says, "he admits that, immediately, "or soon afterwards, he (the defendant) under and by "virtue of the agreement, and by the authority of "the plaintiff *Sir E. Knatchbull*, entered into posses- "sion of the mansion-house and gardens, though not "by way of a residence for his family; but he is not "now in possession thereof, nor did he continue in pos- "session thereof longer than as after mentioned, nor

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"was he ever able effectually to avail himself of such "possession, by reason of the difficulties as to the title "after mentioned."

It appears that, on the 14th of *November*, 1811, an application was made by the defendant's solicitors to the solicitor of the plaintiff Sir *E. Knatchbull*, requiring "the abstract of the premises purchased by Mr. *Grue-"ber*"—and adding, "Mr. *H.* will be pleased to fur-"nish a general abstract of the whole property, as first "contracted for." They write again on the 11th of *December*, 1811, to remind him; and, on the 26th of "*December*, the plaintiff's solicitor acquaints them "that he has sent the abstract of Mr. *Grueber*'s purchase "according to their desire—the larger abstract con-"taining *Stone-Stile*, as well as *Nash*,—though an ab-"stract of *Stone-Stile* exclusively had been furnished by "him to Mr. *Wildman*'s solicitor—the lesser abstract "forming a part of *Nash*, but being in fact a purchase "under Mr. *Hawkins*'s will, distinct from the purchase "of *Nash*, from his co-heiresses." He adds, "Some "of the co-tenants have incumbered their shares, of "which separate abstracts will be delivered without "delay, and it is intended to pay off these incum-"brances previous to the completion of the purchase."

On the 23d of *January*, 1812, the defendant's solicitors laid the abstracts first sent before counsel; and it was not till the 24th of *April* that the *Supplemental* abstracts promised in the letter of the 26th of *December* were furnished; but in the mean time the defendant had caused notices to quit, signed by Sir *E. Knatchbull*, to be served on the tenants. It is also stated in the answer that several of the deeds mentioned in the two first abstracts were not produced—that many of the statements in those abstracts were unsupported by evidence

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evidence—and that considerable difficulty arose in identifying the property. Then there is another objection taken—that, as to the marsh lands comprised in lot 3. there was a deficiency on the abstract of 32 acres out of 95; and it is stated, that on the 5th and 7th of *May*, conferences were held between the respective solicitors on this deficiency, as well as on the title to *Cole-Nash*, and other difficulties appearing on the face of the abstracts, when the solicitor for the plaintiffs informed the defendant's solicitor, in answer to such objections, that *Cole-Nash* had been laid open and thrown into the park belonging to *Nash Court*—that the deficiency in the quantity of the marsh lands arose from the difference between an old estimate and recent admeasurement—and that the statements in the abstracts which were unsupported by evidence were matters of undoubted fact, although no evidence could be obtained respecting them.

On the 13th of *May*, 1812, the solicitor for the plaintiffs makes to the defendant's solicitor a new representation in writing respecting *Cole-Nash*, which had before been described as a part of the park, and is now stated as consisting of the premises comprised in five several numbers, forming component parts of lot one, in the printed particulars.

On the 15th of *May*, the counsel before whom the abstracts were laid, returns them to the defendant's solicitors with several queries and observations on the margin of the first abstract, and written at the foot, as follows:—"The recovery suffered by *I. C.* in 1758 "did not bar his estate tail, or the remainder over. "Unless, therefore, the vendors can shew, either that "all his children are dead without issue, and that Sir "*I. C.*'s daughters died without issue (which I take "not to be the fact), or that they are barred by the "Statute

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"Statute of Limitations, they cannot make a good title "to the premises in question." On the 16th of *May*, this opinion, and the marginal observations, were communicated to the solicitor for the plaintiffs, who on the 23d returned the abstract, with answers to the observations, which answers, or many of them, the defendant says he has been informed and believes were very unsatisfactory.

The answer then states some material transactions between the defendant and *Rutton*, who then occupied *Nash Court Farm*, comprising the greatest part of lot one, with the exception of the mansion-house, stating himself to be tenant thereof at a rent of 500*l.* a year; which, it may be said, was holding it on very favourable terms to himself, though he appears to have originally thought otherwise; and it is intimated that one of the plaintiffs had an interest in his keeping possession; but *Rutton* at an early period gave notice to the defendant that, at *Michaelmas*, when he was to quit, he should sell the stock and crops of grass and corn, and manure, and every thing due that could be sold, and even more than was usual (according to the custom of the country) for an occupier to sell, off the premises; making him an offer to purchase. Some difficulties having arisen as to *Rutton*'s right to do this, a remonstrance was made to Sir *E. Knatchbull*, who recommended an arbitration, and the arbitrator determined in favour of *Rutton*. Upon this, the defendant purchases; and in his answer he complains of his being forced to do so, and speaks of the arbitrator's not having done justice. However, there is the arbitration; and it does not seem material to the present question to consider whether the arbitrator was right or wrong in his decision. The defendant paid about 5500*l.* for the articles; and he conceives himself to have been injured in this respect to the extent

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of 400*l.* or 500*l.*; but, for the reason already stated,—*viz.* that it is not material to the present question,—I pass over the correspondence between the defendant and *Rutton* on this subject, and also that which passed on the subject of Sir *E. Knatchbull's* taking possession of the furniture.

On the 13th of *June*, 1812, the plaintiff's solicitor returns the abstract of the title to *Cole-Nash*, with a letter, informing the defendant's solicitor that he is unable to throw any material light upon it, but that a fine levied in 1778 had been considered at that time, when Mr. *Hawkins* (from whom the plaintiffs claimed) made his purchase, to make a good title, and, if otherwise, still that the price objected to formed so small a portion of the entire purchase, that the defect of title ought to be overlooked.

On the 23d of *July*, he writes again, saying that Mr. *Wildman's* purchase is ready for completion, and that the plaintiffs are ready to sign, but decline to proceed till they have the defendant's approval of the title, and an assurance that he is prepared with his instalments on the 1st of *August*. This letter is followed by another on the 24th pressing dispatch, and by a note on the 27th, containing an appointment for a meeting on the next day between the counsel of the respective parties; and then comes a letter written on the same day, which appears to be merely an endeavour on the part of the solicitor for the plaintiffs to set the purchaser right as to the objections taken with regard to quantity, on certain points which were only imperfectly shewn by the abstract; and I do not find in the subsequent correspondence any notice of those objections, except in general terms that a good title had not been sufficiently shewn.

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The meeting between the professional gentlemen took place, and their opinion is communicated to the defendant by his solicitor, at the request (as it is stated) of one of the plaintiffs, in a letter dated the 29th of *July*, (which appears to me an extremely proper letter). "We have had a consultation at Mr. *Butler*'s chambers, "and both he and Mr. *Cooke* are decidedly of opinion "that the title to *Cole-Nash* is irremediably bad, or "(at least) that it is absolutely bad unless further in-"quiries are made, and the result of those inquiries turn "out favourable. The parties think it would be ex-"tremely imprudent, as well as an useless loss of time, "to institute any further inquiry," (by which seems to be meant that such inquiry might bring forward a title of some other person better than that either of the vendor or purchaser,) "and propose, with a view to the speedy "completion of the purchase, that they either indem-"nify you, or take *Cole-Nash* back at a fair valuation, "or relieve you altogether from the purchase;"—and it ends with recommending "an honourable arrangement "between the parties," as "the only course that can "be adopted without having recourse to litigation, "which the proprietors are equally anxious with your-"self to avoid."

Where a man contracts to purchase, on the faith of the vendor's having a good title, he has a right to have the title sifted to the bottom before he can be called upon either to accept an indemnity, or compensation for a defect, or to abandon the contract.

Here then are three alternatives—but, whatever may be my opinion as an individual, I am bound, as a judge, to say, that, where a man makes a purchase of an estate to which the vendor represents that he has a good title, in such a case the purchaser has a right to insist that the question, whether he have, or have not a good title, shall be sifted to the bottom, before he can be called upon to adopt either alternative, and before the vendor can be let off from his original contract. Accordingly, the defendant had a right to say, if he

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chose—"I will have these inquiries made, before I "determine whether to take the property at all, or in "the qualified mode in which you now propose that I "shall take it."

It appears that, after this, several arrangements were proposed as to Mr. *Wildman*'s purchase, and on this subject I shall say nothing but that, having read the papers over and over again with the greatest attention, the result is, that the defendant has a right to see that that purchase is made good by the vendors, without prejudice to his right to dispute the title to the other parts of the estate.

The answer, after stating so much of the transactions as leads to this result, goes on with the correspondence, and states a letter from the solicitor for the plaintiffs to the defendant's solicitors, dated the 31st of *July*, 1812, referring to a proposal from them "that the purchase "shall be suspended for twelve months in order to "make inquiries respecting the title to the twelve acres;" —and, if nothing should be found, the defendant to take the title on absolute covenants. This letter goes on:—"I can hardly form a judgment upon these pro- "posals, as you don't say how much of the purchase "money Mr. *G*. proposes to pay, and how the remain- "der is to be secured. I see no good that can arise "from the search," &c. (stating reasons why it should not be required.)—"It is too much to say that a pur- "chase of such magnitude should be stopped for such "a trifle, when we offer to take the twelve acres off your "client's hands, or give him an absolute covenant re- "specting them. There hardly ever was a large estate "without some corner of it being in a similar situation, "and it is the first time I ever saw such an objection "persisted in by a gentleman who professes to be a will-

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"ing purchaser. I trust Mr. *G.*'s having possession "forms no part of the inducement to the line of con- "duct he adopts. The proposal amounts to no more "than a postponement of the payment, which he had "better ask in a direct way. How far the parties "could accommodate him I cannot pretend to say, "though I think it might be managed upon mortgage "of the premises," &c. It states that the second instalment is then become due, the first not having yet been paid, and dwells on the great inconvenience sustained by the parties in consequence of so trivial an objection. He writes again on the 3d and 5th of *August*, pressing for some definitive answer, and stating further circumstances of embarrassment and serious injury to some of the parties by reason of the delay. On the 7th, the defendant's solicitors write an answer as follows:— "We saw Mr. *G.* yesterday, and communicated to "him your letters, in answer to which he can do little "more than refer to what has been before stated. He "has no objection to the *Stone-Stile* purchase being "completed, *without prejudice to the title to the other* "*estates*," (a qualification of his consent to that purchase being completed, which, it also appears, was acknowledged on the part of the vendors,)—"and he is "willing to consent to his 5000*l.* deposit being appro- "priated in any way that suits best the convenience of "the proprietors. He is also quite willing to advance "part of his purchase money, notwithstanding no pains, "or next to none, have been yet taken to clear the dif- "ficulties in the title. He also confirms what Mr. "*Preston*" (one of the defendant's solicitors) "stated, "in answer to the obvious apprehension of the proprie- "tors that he wished to relinquish the purchase, that he "has no such intention, nor ever had. If, after dili- "gent inquiries have been made in order to perfect the "title, the result should not be favourable, he will then

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" be willing to take such title to *Cole-Nash* as the pro-" prietors will be able to give him, *upon having abso-" lute covenants and a compensation*"—(what is precisely meant by these last words it is difficult to ascertain—) " with respect to the time necessary to prosecute the " inquiries with effect, we mentioned twelve months to " *Col. De Billinghurst* (one of the plaintiffs), because " he desired us to name some period—you must be " perfectly satisfied that that time is little enough for " such an inquiry as the title requires. All the other " parts of your letter are provided for by the agree-" ment," &c.

On the 10th of *August*, the solicitor for the plaintiffs acquaints the defendant's solicitor with some inquiries made respecting the title to *Cole-Nash* of a Mr. *Tappenden*, whose answer to those inquiries is enclosed; and it contains one passage which I think material, first, because it shews what was Mr. *Hawkins*'s opinion, when he was owner of the estate, as to the nature and materiality of the property, and next, because it does not quite come up to what is here represented. " Mr. " *Hawkins* was a willing purchaser of *Cole-Nash*. He " was informed that the title was only under a mort-" gage in fee, and his reply (I well remember) was, that " it was good enough for him, and he would not miss " the purchase, as the land was close to his property, on " any account whatever." Taking this, then, to be an accurate statement as to *Hawkins*'s feelings on the subject of this property, it shews that it was thought material for him to become the owner of it. Then follow statements as to other considerable purchases made under the same title; but, as to those, it is enough to say that this Court does not sit to determine that men shall be willing purchasers whether they will or not, but to judge whether they have got a title; and, if they have

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have not got a title to part of the premises, there is no principle of equity more artificial than that which goes to determine whether the part to which no title can be made is material, and whether the purchaser, willing or not willing, shall be bound to take the remainder, with any and what compensation for the want of title to the defective part.

will inquire whether a title can be had, and, if the title is defective as to part, there is no principle of equity more artificial than that which calls on the Court to decide whether the purchaser shall be bound to take, with any and what compensation.

On the 19th of *August* the solicitor for the plaintiffs writes again to urge the completion of the purchase, upon the strength of Mr. *Tappenden*'s representations, and referring to the alternatives formerly offered. And here, a circumstance occurs, which I will mention lest it should escape me; and which is extremely material in my view of the case—namely, that, if this is to be represented as the case of a purchase of an estate consisting of a large number of acres, with a defect of title to a very small proportion of it—to the extent of twelve acres only,—it must at the same time be recollected that it is a purchase, of which, according to the terms of the contract, possession was to be given immediately; and, possession having been taken under the contract, the effect of it is to enable the vendor to say, "You having "taken possession under the contract, I am entitled to "enforce the contract;"—and, if then it should happen that there turns out to be a defect of title as to a part which is immaterial both in quantity and situation, yet the vendor is not at liberty to disturb the possession, but he must come here, and, leaving the possession as it is, must lay his case before the Court to decide whether there shall or shall not be a specific performance.

Some further correspondence afterwards passed, leaving the question in the same state; and then follows the letter of the 5th of *October*, 1812, where commences the transaction, which I think is the most important of

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any that passed between the parties—for, by his letter of that day, instead of representing to the defendant, (who was in possession, and who was in possession under the contract, which, if it were in any way to be performed, gave him a title to the possession,) that, if he had taken possession with a knowledge of the title being defective to that part of the estate, he had fallen within many of the decided authorities—instead of insisting, (as they now insist,) that the twelve acres are so immaterial that he is bound to take the property at the price stipulated, only with a reasonable compensation for the value of those twelve acres—the solicitor for the plaintiffs writes thus to the defendant's solicitor—"Without entering again into the motives of "Mr. *G.*'s conduct, I will thank you to inform him "that I am directed to tender his deposit money with "interest, and to demand from him that part of the "estate of which the vendors have given him possession; "and, for these purposes, I shall, on behalf of my clients, "attend at Mr. *G.*'s house in *Coleman Street*, on Wed-"nesday next, at twelve o'clock." Now, if the plaintiffs had a right to insist on the performance of the contract, what right could they have to turn the defendant out of possession which was taken under that very contract? The defendant had a right to retain possession, under the contract till a conveyance should be executed, provided the difficulty about the title could be set right, which was still a point in question. But the plaintiffs, by this act, destroy the contract;—and how can they now pretend to have reserved a right to its performance, when by their own act it has been rendered incapable of being performed?

On the 12th of *October*, that stock which *Rutton* had sold to the defendant for 5500*l.*, in order that the defendant might have the benefit of immediate possession

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intended by the contract, (which immediate possession was certainly meant to be a continuing possession,)— that very stock so sold to the defendant was driven off the premises by order of the vendors, who had given notice to the tenants not to pay their rents to the defendant.

Now, if the case rested here, the question would be simply this—whether the vendors can insist that the purchaser shall specifically execute the contract, when, if he were specifically to execute the contract, it is rendered impossible for him to have the full benefit intended him by the contract, and that, through the act of the vendors themselves? Their difficulty on this part of the case is this—it was incumbent on them, if they meant to have the contract carried into execution upon the principle of compensation adopted in this Court in the case of a defective title as to an immaterial part of the purchase, to have left the property in the enjoyment of the purchaser so that he should not be deprived of any part of the benefit intended him by that contract; and I cannot see how it would be possible for the vendors, if nothing more had passed subsequently, to say, —The title shall be good as far as we choose, and bad as far as we choose—you shall not have the benefit of the original contract—but you shall be bound to take the estate with a compensation for so much of it to which we are unable to make a title—and to say this, after they have by their own act placed him in a situation different from that in which he was entitled to stand by the terms of that very contract.

There is a great deal more correspondence, which I can represent only as a negotiation between the parties as to the management of the farms, the plaintiffs struggling to shew that the defendant ought to be considered as still in possession, while the defendant is *fencing*

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against such a possession. I have looked very minutely into this correspondence, but cannot come to the conclusion that the parties have, by the effect of it, been restored to that state in which they were before the turning out of possession.

On a contract for sale of an estate, where by the terms of the contract the purchaser is to be let into immediate possession, and a question afterwards arises as to a part to which no title can be made, the vendor cannot turn the purchaser out of possession, and retain to himself the benefit of the contract.

It only remains to be seen how the materiality of these twelve acres is put in issue—and that is represented by the answer to depend, not only on the nature and quality of the land, but on the use to be made of it with regard to the rest of the purchase. I do not, however, think it necessary to go into the cases on the subject; for, if the parties are not restored by the subsequent correspondence to the state in which they stood prior to the 5th of *October*—(and I have expressed my opinion that the subsequent correspondence does not restore them to that condition—) the plaintiffs cannot make a case to enable them to say, If we did wrong upon that occasion, we are nevertheless entitled to the same relief as if we had acted otherwise. Where parties enter into a contract for the sale and purchase of an estate, and the vendor is unwise enough to make it part of the contract that the purchaser shall take immediate possession, and the question afterwards arises whether it is a case for compensation as to a part to which he is unable to make a title, the vendor cannot, in such a case, (to use the language of this defendant,) turn the purchaser in and out of possession just as and when he thinks proper.

Upon that part of the case, then, I think the transaction of the 5th of *October* is alone sufficient to put an end to the question. If it were necessary to go into the other part of the case, although I apprehend that the Court is not always bound to send such matters to the Master in the shape of a reference, but may decide for itself upon the evidence before it, if sufficient to enable

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it so to do;—I should nevertheless hesitate long before I could determine, (regard being had to all the circumstances, as the question of materiality is here put in issue,) that these twelve acres of land do not form, in the sense of the Court, a material part of the purchase; as to which there is the evidence of what was *Hawkins*'s opinion at the time when he became the purchaser, and there is also the material fact that a considerable part of the estate is intersected by these twelve acres. I have looked into the case of *Drewe* v. *Hanson* (a), and that other case before the present Master of the Rolls (b), where, the representation being that the house was in good repair, and the land in a state of high cultivation and in a ring fence, the Master of the Rolls thought that, as to the house not being in repair, that might be compensated by its being put into repair, unless it could be shewn that the purchaser wanted possession of the house to live in within a certain time—and so also as to the marsh land not being in so good a state of cultivation as had been represented. But, as to the estate not being in a ring fence, it was not quite so certain that a pecuniary value could be set upon the difference between a farm so situated, and one which is scattered and dispersed with other lands. I know by experience that a small piece of land running through one person's ground to another's may occasion as sensible an inconvenience as a landlord is capable of sustaining. Still, I agree that a mere speculative objection as to the mischief likely to result, is not that which the Court will proceed upon, and that I must ask, what is the nature of this land?—and, in answer to this question, I do not find that the nature of the land is so put in issue as to enable the Court to determine as to its materiality. But, considering that all the witnesses for the defendant

(a) 6 Ves. 675. *Drewe* v. *Corp*, 9 Ves. 368.

(b) 10 Ves. 505.

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speak as to its being material, and that nothing is said with regard to the question on the part of the plaintiff; and, regard being had to the decided cases, and to the circumstance that this Court is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have,—I should be going much too far in saying that the twelve acres are not material, and that he shall be compelled to take the estate without them.

In the case of the estate sold as freehold with leasehold adjoining, which turned out to be almost all leasehold (*a*); the abstract having been delivered, upon which no objection was made by the purchaser, the Master of the Rolls held that, if the purchaser had made the objection, he could not have been bound to perform the contract; but that, having known the fact as it appeared by the abstract, and yet made no such objection, it became a question whether the quality of the land at all entered into the intention with which he made the purchase. So, where the contract was for land lying within a ring fence, and the defendant purchased, knowing that it was not within a ring fence, the Master of the Rolls held that he could not be admitted to say afterwards that he would not perform the contract for want of a ring fence, when he probably bought the land for less money on that very account. (*b*)

But, without entering into those cases, the ground upon which I rest the present case is this—that nothing was done previous to the 5th of *October*, 1812, amounting to a waiver on the part of the defendant of his

(*a*) *Fordyce* v. *Ford*, 4 Bro. 494.

(*b*) *Dyer* v. *Hargrave*, 10 Ves. 505. See Sugd. Vend. and Purch. chap. 6. sect. 2.

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right to the possession, and that the turning him out of possession at that time was an act, however meant, which has rendered it impossible for the vendors specifically to perform their part of the contract, even if they would otherwise have been entitled to a specific performance with a compensation to be made for the defect of title to *Cole-Nash*. And, upon this ground, I am of opinion that the decree of the Vice-Chancellor should be affirmed.

Decree affirmed.

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July 15.

PARTINGTON and Another
v.
BOOTH and Another.

Injunction to restrain the defendant (plaintiff at law) from taking possession under a verdict obtained by him in an action of ejectment. Previous to the issuing of the injunction, the costs of the action had been taxed, and a writ of possession executed. The plaintiff at law afterwards procured an attachment for non-payment of the costs taxed. This is a breach of the injunction—but, as the injunction had been improperly issued, the Lord Chancellor would make no order as to committing the party for the contempt.

THE bill was filed on the 12th of *November*, 1817, and on the 28th of *November* an injunction was granted (for want of appearance) to restrain the defendant *Booth* from taking possession under the verdict obtained by him in an action of ejectment against the plaintiff *Partington*, and from proceeding in an action on a bond against the said plaintiff, and also from commencing any other action on the bond or respecting the matters in the bill mentioned.

Previous to this injunction being issued, the costs had been taxed in the action of ejectment, and a writ of possession sent down to *Manchester* (where the plaintiff resided), which had also been duly executed; and, in *May* following, the defendant's attorney, *Dicas*, (who was also a co-defendant) instructed his agents in town to forward an attachment for non-payment of costs, which was sent down accordingly, and lodged with the sheriff's officer, who had the defendant already in custody for a contempt in not putting in his answer to a bill in the Exchequer.

The plaintiffs now moved that the defendants *Booth* and *Dicas*, and their agents in *London*, may be severally committed for a breach of the injunction—and the question was, Whether, under the circumstances, a breach of injunction had been incurred by issuing the attachment.

Wingfield, for the defendants, insisted, that the injunction did not extend to a proceeding for costs in an action

action whereon judgment had already been obtained, and which costs had been taxed before the issuing of the injunction.

Sir *S. Romilly*, contrà, in support of the motion.

The LORD CHANCELLOR

Was decidedly of opinion that a breach of injunction had been incurred by the issuing of the attachment for costs. If the circumstances of the case had been fully explained to the Court at the time when the injunction was granted, that injunction would not have been allowed to extend so far as it did. But, as the case then stood, the injunction, however erroneously granted, was an order of the Court, and must be obeyed.

His Lordship made no order as to the commitment; but ordered the defendants and their solicitors to pay the costs occasioned by the breach of the injunction, and of the present application. (*a*)

The injunction was afterwards dissolved on a motion by the defendants.

(*a*) Reg. Lib. 1816. B. fo. 1368.

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ROLLS, July 21, 22.

GIRAUD and Others, . PLAINTIFFS;

AND

HANBURY and Others, - DEFENDANTS.

Testator appoints *A.* and *B.* his executors, together with his wife, "hoping they will be so good, out of respect to his wife, to accept the office." And *as to what worldly property he had,* "I dispose of the same in manner following." The testator then gave several specific and pecuniary lea cies, but made no disposition of the residue.

Held, that the intention was clearly expressed, by the clause requesting the executors to accept the office, followed by the declaration as to his disposal of his whole property, that the executors should not take the residue beneficially.

THIS case arose on the will of Major *Woolhead,* whereby he appointed the defendant *Hanbury* and another, in conjunction with his (the testator's) wife, executors and executrix of his will, "hoping they "will be so good out of respect to my wife to accept "the same." And then went on—"As to what worldly "property it has pleased Providence to bestow upon "me, I dispose of the same in the following manner;" *viz.* To his (the testator's) said wife, his furniture, plate, &c. To the defendant *Hanbury* and his wife, and to the other executor, ten guineas each for mourning, and a ring of the value of two guineas. He then gave to his wife the interest during her life of all sums he had, or might at the time of his decease have invested in the Bank of *England* and elsewhere. And, after some other pecuniary legacies, gave to *John Sampson* and *Margaret* his wife, after the decease of his (testator's) widow, the interest of 1000*l.* 5 *per cents.* during their lives, and after their deaths, the principal equally to be divided between their two daughters, the plaintiffs. But he made no disposition of the residue.

Mrs. *Sampson* (who was the testator's sister and next of kin living at his death,) having died in the lifetime of the widow, who was since also deceased, the bill was filed by the daughters and their respective husbands, claiming to be the next of kin of the testator living at the death of the widow, for an account, and that the resi-

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due might be ascertained, and the plaintiffs declared entitled thereto, and be paid the same in equal moieties. The defendants, the surviving executor (who was also executor of Mrs. *Woolhead*), and the representatives of their deceased co-executor, insisted that the plaintiffs were not entitled as next of kin of the testator at the death of his widow, the testator having already devised to them what he intended they should have; but that, according to the true construction of the will, the executrix and executors became entitled to such residue for their own use and benefit, subject to the life interest of the widow.

Sir *Samuel Romilly* and *Parker*, for the plaintiffs.

Hart and *Barber* for the defendants, *Hanbury* and the representatives of the deceased executor, contended, that the legacies to the executors being unequal, they were not excluded from the residue; and referred to the rule in *Blinkhorne* v. *Feast* (*a*) and to *Pratt* v. *Sludden* (*b*). In this will there were no words to convert the executors into mere trustees, which could never be held to be the effect of the testator's expressing merely his hope that they would accept the office; nor was there any attempt to dispose of the residue, which, though the gift were imperfect, had been held in some cases to afford a presumption for their exclusion.

Bell and *Richards*, for other defendants.

(*a*) 2 Ves. 27, 28.

(*b*) 14 Ves. 193, and the references. See also *Langham* v. *Sanford*, 17 Ves. 435. Ante, Vol. II. 6, &c.

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Sir *Samuel Romilly*, in reply.

All the cases proceed upon the intention of the testator; and the rule of exclusion is itself founded upon intention. The only question is, Whether such intention, is sufficiently apparent upon the face of the will. Here the testator begins with the appointment of his executors, and then proceeds to make a disposition of his worldly estate. This, in itself, is enough to prove that he did not conceive himself to have already disposed of it by naming his executors; and, added to the inference from that circumstance, the words of request afford a very strong confirmation of the intention not to give them a beneficial interest beyond the legacies expressly provided for them.

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The words used by this testator in appointing his executors are strongly indicative of an intention to impose a burthen, not to confer a benefit upon them. If they were to take beneficially after the wife's death, they would have had a sufficiently strong inducement to accept the trust, and to manage the estate to the best advantage.—The more they served her in the first instance, the more they would eventually serve themselves. But the testator seems to conceive that he is appointing them to an office which, but for their respect to his wife, they might possibly decline. It is from that motive only that he hopes for their acceptance.

In *Lord North* v. *Purdon* (*a*), the expression used by the testator was "that he heartily requested "the defendants to take upon them the execution "of his will." But the case did not depend altogether upon

upon that clause, there having been a bequest over of the residue with a blank for the name of the person to take. And *Sir John Strange*, after observing upon that inchoate clause, adds, that "when the testatrix mentions her executors by name, and only as such, in the following sentence, she plainly intended them no further favour; and there are added pathetic supplicatory words addressed to her executors, to take on them the execution and burthen of the will; which words she could not be supposed to have used had she intended them so great a benefit as the residue." So, in this case, the testator declares, in the clause immediately following the appointment of his executors, that he means to dispose of the whole of his property; and then, can it be supposed that he would have expressed a *hope* that they would consent to accept the bulk of his property, and have the kindness to take care of it till it becomes their own? The intention is plain, to dispose of the whole. He does not fully execute that intention, but still this shews that he meant the whole to be the subject of subsequent disposition, and did not conceive that by the appointment of executors he had already disposed of it. I am therefore of opinion that the executors were intended to take the office only, and not the beneficial interest.

(*a*) 2 Ves. 495.

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July 21.

COOPER and Others
v.
DAY and Others.

Testator gives 4000*l.* to trustees upon trust for his two daughters at twenty-one; and directed that the legacy duty due in respect thereof shall be paid by his executors out of the residue.

By codicil, reciting this bequest, and that he is desirous of increasing the same to 5000*l.*, he revokes the gift of 4000*l.*, and gives 5000*l.*, upon the same trusts, &c.

By a second codicil, reciting the former, and that he is desirous of further increasing to 6000*l.*, he revokes the gift of 5000*l.*, and gives in lieu thereof 6000*l.* upon the same trusts. This is not a revocation, but substitution, in each instance; and the 6000*l.* is therefore exempt from the legacy duty.

THE testator in this case, by his will, bequeathed to *A. B.* (widow) 800*l.*, to be paid to her within three months after his decease; and declared it to be his will that the legacy duty which might be due and payable in respect of the said 800*l.*, and of 4000*l.*, thereafter bequeathed to trustees therein named for the benefit of his two daughters by the said *A. B.*, should be paid by his executors out of the residue of his personal estate. The testator then bequeathed to the plaintiff *Cooper* and another 4000*l.*, to be paid to them within six months after his decease, upon trust to invest the same in Government securities, and pay and apply the dividends for the maintenance and education of his said two daughters in such manner as *A. B.* should direct; the principal sum of 2000*l.* (part thereof) to be paid to the eldest on her attaining 21, and the remainder to the youngest daughter on her attaining the same age.

The testator made two codicils to his will, by the first whereof, after reciting that he had given to *A. B.* 800*l.*, payable as aforesaid, he gave to her 200*l.* in addition to the said 800*l.*, which additional sum he declared to be free from all legacy duty payable thereon or in respect thereof, and which duty he directed in like manner to be paid out of the residue; and then went on as follows: — "And whereas I have given to (the trustees named in his will) 4000*l.*, upon the trusts therein mentioned, and am desirous of increasing the same to 5000*l.*, I revoke the said gift of 4000*l.* and give to (the said trustees)

5000*l.*,

5000*l.*, upon the trusts, and to and for the same intents and purposes, and under and subject to the same powers, provisos, and limitations, as are expressed and declared in and by my said will of and concerning the said legacy or sum of 4000*l.*, and upon or for no other trust or purpose whatsoever."

By the second codicil, reciting that by his will he had given 4000*l.*, upon the trusts therein mentioned, and that by the former codicil he had increased the said legacy to 5000*l.*, and that he was then desirous of further increasing the said legacy of 5000*l.* to 6000*l.*, he went on, "Now I do hereby revoke the said gift of 5000*l.*, and give and bequeath in lieu thereof to (the said trustees) the legacy or sum of 6000*l.*, upon the same trusts, and to and for the same intents and purposes, and under and subject to the same powers," &c. as before.

This was an amicable suit, instituted for the purpose of taking the opinion of the Court whether the 6000*l.* bequeathed by the last codicil was to be paid to the plaintiffs (the trustees) by the defendants (the executors) free from the legacy duty or not.

Bell and *Cooper*, for the plaintiffs,

Contended that the legacies of 5000*l.* and 6000*l.*, given by the two codicils, must be clearly taken with reference to the original legacy of 4000*l.*, by way of increase or augmentation, and in like manner, clear from the legacy duty; and that this more evidently appeared to be the testator's intention from his having expressed it to be so in the case of the 200*l.* given by the first codicil in addition to the 800*l.* to *A. B.*

Horne and *Blake*, contrà,

Said that the 200*l.* was expressed to be in addition; but that the 5000*l.* and 6000*l.* were merely substituted

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for the 4000*l.*; and, being substituted legacies, there was no pretence for saying that the testator intended they should, like the original legacy, be clear from deduction in respect of the duty; and they referred to *The Duke of St. Albans* v. *Beauclerk* (a), to shew that they could not be taken otherwise than as a substitution.

The MASTER *of the* ROLLS.

The difficulty in this case arises from the contrariety of expression in different parts of the same codicils. The question is, Whether the testator meant to revoke the first legacy, and substitute others, or merely to augment the first to the extent of the others. If his words in one part of the second codicil are to be construed strictly, they amount to a total revocation of the first legacy. But then, in another part of the same codicil, come the expressions, that he has *increased*, and is desirous of farther *increasing*, &c., which seem to imply an augmentation in amount, without any alteration in circumstances.

On a subsequent day His Honour said that, upon the authority of *Leacock* v. *Maynard* (b), and *Crowder* v. *Clowes* (c), he was of opinion that the substituted legacy of 6000*l.* was to be taken as exempted from the legacy duty, in like manner with the original legacy in the place of which it was substituted; and decreed accordingly.

"Declare, the legacy of 6000*l.*, according to the true construction of the will and codicils, not liable to any deduction on account of legacy duty. Decree, such legacy duty as may be payable thereon, to be paid out of the residue."

Reg. Lib. 1816. A. fo. 1546.

(a) 2 Atk. 636.
(b) 3 Bro. 233. 1 Ves. jun. 279.
(c) 2 Ves. jun. 449, 450.

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August 6.

JOHN WILLIAMS, - - - - - Plaintiff;

AND

J. T. BRAMWELL WILLIAMS and CAROLINE his Wife, and JOHN HARRIS, - Defendants.

Quære, Whether a Court of Equity, in the exercise of its jurisdiction to decree the specific performance of an agreement, can interfere by injunction to restrain a party from divulging a secret in medicine, which is unprotected by patent.

In this case an injunction which had been granted for that and other purposes was dissolved upon the affidavit of the defendant (an infant) denying the facts of the case as represented by the plaintiff's affidavit in support of the injunction, and upon the ground that there was no secret in the alleged invention.

THIS was a motion to dissolve an injunction which had been granted by the Vice-Chancellor to restrain the defendants and their agents "from divulging or "exposing the secrets in the bill mentioned or either "of them, and from making, preparing, vending, or "selling the medicines or remedies therein mentioned, "or either of them, or otherwise disposing thereof or "interfering therein in any manner howsoever." The injunction had been obtained upon an affidavit stating that the plaintiff had for several years carried on an extensive practice in the cure of diseases of the eye, and was the sole inventor and owner of recipes for preparing medicines for those purposes;—that, being desirous of promoting the success in life of his son the defendant *Bramwell Williams*, he acquainted him with the secret of making such medicines, and gave him the management of his dispensary with a view of taking him into partnership, if he should conduct the business from *March* 1817, to *February* 1818, (the day on which he would come of age) to the plaintiff's satisfaction;—that he made a proposal to the defendant to such an effect, which the defendant accepted, and promised so to conduct himself with a view to its completion;—that, having confidence in the defendant's integrity, he thereupon put him in possession of his floating stock of medicines and other things, and actually caused a draft of partnership articles to be prepared by his solicitor;—that after the defendant had so taken upon himself the management of the business, instead of conducting him-

self

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self according to his engagement with the plaintiff, he assumed the entire dominion over the concern, and endeavoured to exclude the plaintiff from all controul therein, and, instead of keeping the secret communicated to him by the plaintiff for making the eye medicine, as he ought to have done, he communicated the same to his wife and to the defendant *Harris*, with a view to injure and ruin the plaintiff, and, upon his remonstrating with him, not only set him at defiance, but removed the various articles committed to his custody, and sold large quantities of such articles, and offered the medicines to sale, and threatened to prepare such medicines and to vend the same, and to sell and distribute various publications of the plaintiff relative thereto, and to divulge the secret;—having, by such acts, deprived the plaintiff of the means of carrying on his business.

The bill prayed that the defendant *Bramwell Williams* might deliver to the plaintiff all and singular the articles so removed by him as aforesaid, or such as then remained undisposed of, and an account of such as had been disposed of, and of the money received for the sale of the medicines, &c.; and an injunction in the terms above stated.

The defendant *Harris*, by his answer, denied that the other defendant had communicated the secret to him, and disclaimed all interest in and concern with the matters in dispute.

The defendants *Bramwell Williams* (who was an infant) and his wife (who was of age) had appeared, but put in no answer to the bill; and, by an affidavit filed by them in support of the present application to dissolve the injunction, denied the claim of the plaintiff to be the sole inventor of the secret in question, alleging that

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that the defendant (the infant) had been early in life instructed in it by his mother, who had herself received it from another, and communicated it to the plaintiff, her husband. With regard to the other objects of the injunction, the affidavit went on to deny the truth of the case made by the plaintiff's affidavit, stating that the defendant had never assumed any dominion over the property entrusted to him, but had sold such parts as were disposed of under and by the express directions of the plaintiff;—admitting, however, that he had prepared some medicines according to the secret communicated to him by his mother, and insisting that he was justified in so doing. It also set up an undertaking by the father to admit his son a partner, with one half of the profits of sale, as an inducement held out by him for the intermarriage of the defendants.

Sir Arthur Piggott and *Wilson*, in support of the motion to dissolve the injunction.

Leach and *Moore*, contrà.

The LORD CHANCELLOR, (stopping the reply.)

There can be no doubt that the Court was strictly regular in granting the injunction, except so far as it goes to restrain the defendant from divulging the secret.—If, on a treaty with the son, while an infant, for his becoming a partner when of age, the plaintiff had, in the confidence of a trust reposed in him, communicated to him this secret, and at the same time given him the possession of the articles mentioned in the bill; and, instead of acting according to his trust, the son had taken to himself the exclusive dominion over these articles, and begun to vend them without permission, it must be said that he had no right in any case so to act,—and that he was bound, either to abide by, or to waive, the agreement. If, then, he had intended

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tended to abide by the agreement, the injunction was so far right—and, if to waive it, he was bound to return the articles, and so far the injunction was also right in that case. Upon the plaintiff's affidavit, therefore, the injunction was properly granted as to this part of the case.

But so far as the injunction goes to restrain the defendant from communicating the secret, upon general principles, I do not think that the Court ought to struggle to protect this sort of secrets in medicine. (*a*) The Court is bound indeed to protect them in cases of patents, to the full extent of what was intended by the grant of the patent, because the patentee is a purchaser from the public, and bound to communicate his secret to the public at the expiration of the patent. Then, whether the principle can be extended to such a case as this—whether a contracting party is entitled to the protection of the Court in the exercise of its jurisdiction, to decree the specific performance of agreements, by restraining a party to the contract from divulging the secret he has promised to keep, that is a question which would require very great consideration. But the present case is not one which calls for the determination of it. If the defendant has already disclosed the secret, the injunction can be of no use. If he only threatens to disclose, it then becomes necessary to look at his affidavit; and by that he insists that what he has to disclose is no secret at all. Then how is the Court to try this question?—or what can the Court do with the case altogether?

Upon the other part of the case there appears, by the defendant's affidavit. to be no ground for supporting the injunction.

Injunction dissolved.

(*a*) See *Newberry* v. *James*, Ante, Vol. II. p. 446.

END OF THE FIRST PART.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

57 Geo. III. 1817.

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JOHN JONES, - - PLAINTIFF;

AND

WILLIAM JONES, THOMAS JONES, HENRY JONES, WILLIAM TAYLOR, and WILLIAM COKER, and JOSEPH JONES, and Others, (infants), - - - - - - DEFENDANTS.

[The MASTER of the ROLLS for the LORD CHANCELLOR.]

March 17. *July* 29.

A Court of Equity has no jurisdiction to determine on the validity of a will, either of real or personal estate.

Demurrer to bill by heir at law, for a discovery, seeking also relief, allowed; the relief sought being *first*, that an issue might be directed to try the question in a different county, on an allegation of undue influence—an heir at law not being entitled to any issue except by consent, and a bill in equity not lying to change the *venue*. *Secondly*, for the production of title-deeds, without its being shewn how they can be of service in assisting him to recover at law. *Thirdly*, to restrain the defendant (devisee) from setting up outstanding terms, unsupported by allegation that there are any outstanding terms which may be set up. *Fourthly*

THE bill, filed *July* 3, 1816, stated that *William Jones* (deceased) was at the time of his death seised of large freehold and copyhold estates in the county of *Suffolk*,

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Fourthly, for an injunction to stay waste and destruction, &c. and for a receiver,—there being no instance of the Court so interfering, as between heir at law and devisee, where their adverse rights are in litigation; and on the ground of negligence and delay; the bill having been filed more than two years after the death of the presumed testator; and no action yet brought; although the commission of the alleged acts of waste and destruction stated to have been immediately after his death. *Fifthly*, that the plaintiff may be let into possession of copyholds unsurrendered to the use of the will; that being mere legal relief, although he might have been entitled to the discovery whether there were any copyholds unsurrendered. The bill also going on to pray, in the character of one of the next of kin, for an injunction from interfering with the personal estate, and a receiver; the injunction asked being for an indefinite period, and no allegation of a suit depending in the Ecclesiastical Court.

And, although some of the discovery sought might have been proper to be obtained on a bill for discovery only, yet the demurrer allowed as to that also, upon the ground that, to support a general demurrer to a bill seeking discovery and relief, it is sufficient to shew that the plaintiff is not entitled to the relief he prays.

Suffolk, and had contracted to purchase other estates in the same county, and was also possessed of leaseholds and of a considerable other personal estate; and that he died on the 31st *January* 1814, intestate and without issue, leaving the plaintiff his heir at law, who at his death became entitled to all his said real estates. The bill further stated that the testator was very old and infirm, and for some time previous to his death not of disposing mind, but that, after his death, one *Frost*, an attorney, produced to some of the relations who were assembled at the house of the deceased, several loose sheets, which he informed them were the testator's will, made by him only two days before his death; one only of these sheets being signed with his name, and not attested so as to pass real estates, by which it appeared that he had given large parts of his real estates to his nephews (the three first named defendants), and other parts thereof, (together with his personal property,) to the defendants *Taylor* and *Coker* (whom he also appointed executors) upon trust to sell, and pay divers legacies and annuities; and, as to the residue, in trust for the defendant *Thomas Jones*. That this will had never been proved; but the devisees had entered into possession of the estates thereby given to them respectively,

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and the trustees and executors had also proceeded to act under the trusts thereby reposed in them. The bill further alleged that the plaintiff intended to bring actions for the recovery of the estates, but that he could not safely proceed without a discovery of the matters aforesaid, especially of any outstanding terms or other incumbrances which might be set up to defeat him at law, and also that, from the extent of the property, and the number and influence of the persons claiming under the will, he could not hope for a fair trial within the county; for which reason the bill claimed the assistance of the Court in directing an issue *devisavit vel non* to be tried in another county. The prayer of the bill was as follows:—"That the defendants may answer the premises, and that after a full discovery of the matters aforesaid it may be declared that the said pretended will was not the true last will of the said *William Jones*, and that the said rough draft bearing date the 29th day of *January*, 1814, may be declared to have been obtained from the said *William Jones* by fraud, if signed by him in mistake and ignorance of its contents, and that the same may be delivered up to be cancelled, or that an issue, whether the said *William Jones* made any will or not, may be directed to be tried at the assizes to be holden in and for any county adjoining the said county of *Suffolk*; and that all proper and usual directions may be given for the trial of such issue; and that the defendants may produce all the title-deeds, evidences, and writings relating to the said *William Jones*'s real estates, or such of them as may be necessary on such trial, and that they may be restrained from setting up any outstanding mortgage term or terms so as to defeat the plaintiff's claim in any issue or action directed by the Court, or which the plaintiff may be advised to bring for the recovery of any of the said real estates, or the rents or profits thereof; and that, in the mean

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time, the defendants (particularly the trustees and executors and also the said *Henry Jones*) may be restrained by injunction from committing any spoil, waste or destruction on the said *William Jones*'s real estate, or any part thereof, and from selling and disposing of the same real estates, or any part or parts thereof, or charging or incumbering the same, to any person or persons; and that an account may be taken of the rents and profits of the said *William Jones*'s real estates possessed or received by the defendants, &c. since the death of the said *William Jones*; and that a receiver may be appointed thereof; and that the plaintiff may be immediately let into possession of all such parts of the said copyhold estates of the said *William Jones* as was not surrendered to the uses of his will; and that an account may also be taken of the said *William Jones*'s personal estate and chattels come to the hands or use of the said defendants, &c.; and also an account of the said *William Jones*'s debts and funeral expences; and that the said personal estate may be applied in the payment of his debts and funeral expences in a course of administration; and that the clear surplus thereof, and the names and shares of the plaintiff and of the other parties who, whether as the next of kin or representatives of the next of kin of the intestate, shall be entitled to a distributive share and shares thereof, may be ascertained; and that for those purposes it may be referred to the Master to enquire who were the next of kin of the said *William Jones* at the time of his death, or who were or are the representatives of such next of kin, being brothers or sisters; and if such or any of such next of kin, a child or children of a brother or sister, are or is since that time dead, who are or is their or his or her personal representatives or representative; and that all usual and proper directions may be given for taking the accounts, and making the enquiries

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quiries aforesaid; and that the defendants, the pretended executors, may be restrained from interfering with the personal estate; and that the receiver to be appointed as aforesaid may be as well the receiver of the personal estate and effects, and the interest, dividends, and produce thereof, as of the rents and profits of the real estate."

To this bill general demurrers were put in by the several defendants.

Bell and *Barber* in support of the demurrers.

This is a mere ejectment bill,—a bill by an heir at law seeking to impeach a will of real property. On such a question this Court has no jurisdiction. *Kerrich* v. *Bransby* (*a*), *Ex parte Fearon* (*b*), *Pemberton* v. *Pemberton* (*c*) All the Court can do in such a case is to direct an action, or the trial of an issue *devisavit vel non*. Nothing is here wanted in aid of proceedings at law—no account—no production of title-deeds. The alleged ground of waste and destruction will not support the case, for a bill in equity will not lie to restrain waste under an adverse title. But, if there is any equity at all in the bill, at best it is multifarious, and, upon that ground, not to be sustained. The Vice-Chancellor, in a recent case (*d*), has decided in favour of a negative plea to a bill of this sort stating outstanding terms, and praying relief as founded upon such a statement. A party out of possession praying the production of title-deeds must allege that they are neces-

(*a*) 3 Bro. P. C. 358.

(*b*) 5 Ves. 647. and see note.

(*c*) 13 Ves. 290.

(*d*) *Armitage* v. *Wadsworth*, 1 Madd. 189. And see the cases referred to, of *Jones* v. *Davis*, 16 Ves. 265. *Drew* v. *Drew*, 2 Ves. & B. 161. *Evans* v. *Harris*, 2 Ves. & B. 361, &c.

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sary to enable him to maintain an action at law. But here the plaintiff has prayed consequential relief as if the title-deeds were already in his possession. There is a difference between waste and destruction or trespass; and though the Court has sometimes interfered by injunction in the latter case, as in *Crockford* v. *Alexander* (*a*), there is no instance of its so interfering as between heir and devisee (*b*); and the Court will not go further in such cases than it has gone already. To entitle a party to relief in case of waste, there must be a privity of possession. The bill does not pray a receiver in the only way in which the Court will grant a receiver in such a case—that is, pending an action at law—and if it had so prayed, it must have failed; because coupled with a prayer for relief to which the plaintiff is clearly not entitled.

Hart, *Agar*, and *Heys*, in support of the bill.

The bill is not objectionable on the ground of multifariousness, which is only when unconnected portions of right are sought against different defendants who ought not severally to be burthened with the expence of defending themselves against claims to which only one of them is strictly liable.

It was formerly the practice that, where a plaintiff was entitled to discovery though not to relief, the defendant was bound to answer, although he might demur to the relief sought; and when this practice was altered by Lord *Thurlow*, the alteration was certainly not meant to extend to a case of this description, where the objec-

(*a*) 15 Ves. 138. See *Twort* v. *Twort*, 16 Ves. 130. *Grey* v. *Duke of Northumberland*, 17 Ves. 281. *Kinder* v. *Jones*, 17 Ves. 110. *Thomas* v. *Oakley*, 18 Ves. 184. *De Salis* v. *Crossan*, 1 Ball and Be. 188. *Acland* v. *Gaisford*, 2 Mad. 28.

(*b*) See *Smith* v. *Collyer*, 8 Ves. 89.

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tion to the relief only arises out of the jurisdiction. Admitting that the Court cannot decide on the validity of a will in the first instance, yet, if the will be once proved at law to be a forgery, a party afterwards coming into this Court has a right to have the instrument delivered up on the ground that it is against equity to permit the holder to retain it as a future possible cloud upon the title. But in this case the plaintiff is entitled to some, if not to all, the relief he seeks. In the case of *Shewen* v. *Lewis* (a) lately decided at the Rolls,

(a) *March* 2, 1815. I have been obliged by Mr. *Simpkinson* with the following note of this case.

"Bill by co-heirs at law impeaching a will made by their ancestor in favour of the defendant, and praying either an issue, or liberty to bring an ejectment, with the consequential directions. The estates were subject to outstanding terms, as was admitted by the defendant. He also admitted that the plaintiffs were co-heirs, but insisted on the validity of the will.

The plaintiffs went into evidence to shew the incapacity of their ancestor: but their evidence was very slight, and was completely contradicted by the evidence brought by the defendant.

Hart and *Simpkinson* for the plaintiffs contended that, the title of the plaintiffs, and the existence of outstanding terms, being admitted, they were entitled to the relief prayed, in the first instance, without any regard whatever to the evidence; it appearing that the validity of the will was the only question in dispute between the parties, as to which the Court had no jurisdiction to decide.

Sir Samuel Romilly and *Heys* contrà.

The Court was clearly of opinion with the plaintiffs, and granted an issue; and his Honour thought that it was perfectly unnecessary for the plaintiffs to have gone into any evidence under the circumstances, and therefore directed the plaintiffs to pay the defendant the costs of their depositions."

Reg. Lib. B. 1814.
fo. 829, 831.

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which was a bill like the present, the Court directed an issue. This is a general demurrer for want of equity, not objecting to the bill specifically in point of form. The plaintiff has a right to know whether there are any outstanding terms, that they may be removed out of the way of his action. He has a right to the production of title-deeds for this purpose, and that he may know what are the estates of which he wishes to possess himself by ejectment. He is entitled to an issue to be specially directed upon the ground here stated of probable fraud and imposition attending the trial of his action in the ordinary way. Destruction of the property is averred, and interlocutory relief prayed thereon, to which he is also entitled. The Court will interfere in a case of irreparable mischief even where the title is contested. In *Smith* v. *Collyer* (*a*), and other cases, indeed, the Court has refused so to interfere between a devisee and heir: but those were cases where the waste committed was in the usual exercise of the right of enjoyment, as cutting timber, &c. If the subject of contention were a house of considerable value, and the party in possession were about to pull it down, would not the Court interfere to prevent him?

Bell in reply.

The rule adopted by Lord *Thurlow* is most judicious as to a bill praying relief where the party is entitled only to a discovery; and it has accordingly been considered as the settled practice of the Court ever since its first introduction.

With regard to the relief sought in this case, *Powis* v. *Andrews* (*b*) has decided that a will cannot be set aside in this Court upon the ground of fraud, because the

(*a*) 18 Ves. 89.

(*b*) 2 Bro. P. C. 476.

question

question of fraud constitutes a part of the *animus testandi*, as to which the Court has no jurisdiction. If *Marriott* v. *Marriott* (a) were law, a Court of Equity would be always interfering in such cases; but that case, whatever may be its authority, was antecedent to *Kerrick* v. *Bransby* (b), and the question is completely set at rest by the subsequent cases which have been referred to. In *Atkinson* v. *Henshaw* (c), and *Oliver* v. *Ball* (d), a receiver was granted to protect the property pending litigation in the Ecclesiastical Court, and this is a ground on which equity will interfere; but it is not the ground upon which the prayer for such interference is here founded. In *Shewen* v. *Lewis* (e) outstanding terms were alleged, and admitted. The right to the production of title-deeds is only incidental to the discovery, but forms no ground of distinct relief—not such relief as to take the case out of the principle of Lord *Thurlow*'s rule. Waste not only gives no right to the interference of the Court in a case of adverse possession: but, if it did, no case is here made for such interference.

Then as to the interference by injunction to prevent the setting up of outstanding terms; if the bill had been properly framed for that purpose, the relief prayed would have been right as to that, and could only have been met by a plea denying the existence of any. But here is an allegation which can be met by such a denial, and, if we had pleaded to this bill, our plea must have been over-ruled for want of sufficient averment. In *Lady Shaftsbury* v. *Arrowsmith* (f) the Court ordered an inspection of all deeds *admitted* to be in the

(a) 1 Stra. 666.
(b) 3 Bro. P. C. 358.
(c) 2 Ves. & B. 85.
(d) 2 Ves. & B. 96. *Gallivan* v. *Evans*, 1 Ball & B. 191. *Lowe* v. *Fairlie*, 2 Mad. 102.
(e) See note ante.
(f) 4 Ves. 66.

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defendant's possession, creating such incumbrances as were alleged to be in the way of the plaintiff's title at law; but it would go no farther. In an unreported case of *Barber* v. *Hunter* (a), though the bill was properly framed in other respects, the Lord Chancellor held that it is not enough to say that the defendant threatened to set up outstanding terms, but an actual case must be made out.

Then, as to the copyholds—what right can there be to a production of title which may be discovered by inspection of the Court Rolls?

The change of venue is not a sufficient ground to give jurisdiction to a Court of Equity, because, upon a proper representation, the Court of Law will itself give such a direction.

But, if the ground of demurrer for want of equity is held not to extend to all the relief sought, the bill is evidently multifarious, as mixing the questions of real and personal property; and a party is entitled to demur *ore tenus*. Another ground of demurrer is, that no affidavit is annexed to the bill seeking to have the instrument in question delivered up to be cancelled; and, though that is a ground not upon the record, it has been decided that it is not necessary it should be so, to entitle a party to the benefit of a demurrer.

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If this had been a bill merely for a discovery, there are several parts of it to which an answer must undoubtedly have been given. In the body of the bill there is

(a) See post.

a statement

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a statement "that the plaintiff intended to bring an "action or actions at law for the recovery of the free-"hold and copyhold estates devised by the pretended "will;" but it is alleged "that, without the aid and "assistance of this Court in compelling a discovery, he "cannot safely proceed to trial in such action or "actions."

But he concludes with praying relief, upon the same objects, with regard to which he had before stated that he only wanted a discovery in aid of an action. For he prays, that this Court will declare, "that the pretended "will was not the true will of the late *William Jones*, "and that the same may be delivered up to be can-"celled;" and, as consequential on that relief, he prays an account of rents and profits of the real estate—an account of the personal estate—of debts and funeral expenses—an enquiry as to next of kin, and a distribution of the clear surplus.

It is impossible that, at this time of day, it can be made a serious question, whether it be in this Court that the validity of a will, either of real or personal estate, is to be determined. There is, however, an alternative prayer, that the Court will direct an issue to be tried; and then certain other directions are sought, as applicable to that alternative. Now, although there may have been instances of issues directed on the bill of an heir at law, where no opposition has been made to that mode of proceeding, yet I apprehend that he cannot insist on any such direction. He may bring his ejectment; and if there be any impediments to the proper trial of the merits, he may come here to have them removed. But he has no right to have an issue substituted in the place of an ejectment. If he can have no issue, can he have those consequential directions that are asked

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only on the supposition that an issue is to be granted? Although the intention to bring an action had been stated in the bill, it is not with reference to an action, but to an issue, that some of the directions are prayed for as necessary for a proper trial of the merits. It is prayed, that *the issue* may not be tried in *Suffolk*, but in some adjoining county; and that the defendants may produce all the title-deeds, evidences, and writings relating to the said *William Jones*'s real estates, on *such trial*. But, supposing an action had been brought, and that the prayer referred to such action; does a bill in equity lie to change the venue on the ground that no fair trial can be had in the county where the lands are situated?

As to the title-deeds, the bill merely states the fact, that the defendants have the possession of them, but not that they are in any way necessary to enable the plaintiff to recover at law. He stands solely on his title as heir, and does not shew how the required production could be of the least service to him. As Lord *Rosslyn* says in Lady *Shaftsbury* v. *Arrowsmith* (*a*),—"The title of the heir is a plain one, and it is a legal "title.—All the family deeds together would not make "his title better or worse. If he cannot set aside the "will, he has nothing to do with the deeds."

When the plaintiff comes to ask that the defendants may be restrained from setting up any outstanding terms, the language is varied; for it is, "so as to de-"feat the plaintiff's claim in any issue or action di-"rected by the Court, or which the plaintiff may be "advised to bring, for recovery of any of the real estates, "or the rents and profits thereof." This undoubtedly would be proper relief to ask, if it had been averred that

(*a*) 4 Ves. 66.

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there were any outstanding terms. But the case of *Barber* v. *Hunter*(a) is a direct authority that the Court will not proceed on a mere vague allegation that the action may be defeated by setting up outstanding terms. The case before the Vice Chancellor of *Armitage* v. *Wadsworth* (b) shews, that, if the assertion were made, it might be met by a negative plea.

Then there is a prayer, "that, in the mean time," (that is, I suppose, till the trial of such issue or action,) "the defendants may be restrained from committing "any spoil, waste, or destruction on the said *William* "*Jones's* real estates, and from setting or disposing of "or charging and encumbering the same, and that a "receiver may be appointed." No case was cited in which the Court has interfered, at the suit of heir or devisee, to restrain waste, spoil or destruction, by either, while they are litigating their adverse rights in a Court of Law. One should think the case of the devisee a stronger one than that of the heir; because, till the will is set aside, the *primâ facie* title is in the devisee. Yet in *Smith* v. *Collyer*, (c) an injunction was refused, when applied for by the devisee against the heir. I own I cannot see a very good reason why the Court, which interferes for the preservation of personal property pending a suit in the Ecclesiastical Court, should not interpose to preserve real property pending a suit concerning the validity of the devise. But, as a condition of such interference, the Court would certainly expect it to be shewn, that the party applying was proceeding with all due expedition to bring the question to a decision; whereas here, the plaintiff, filing the bill about two years and a half after the testator's death, does not state that, even then, any action had been

(a) See before.

(b) 1 Madd. 189.

(c) 18 Ves. 89.

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brought; whilst the acts of waste and destruction complained of are stated to have been committed soon after the death of the testator. If the Court will not interpose to stay waste, *a fortiori* will it refuse to appoint a receiver, or to restrain the devisee from exercising other acts of ownership over the property.

Then there is a prayer, that the plaintiff may be let into immediate possession of all such parts of the copyhold estate as were not surrendered to the use of the will. That is mere legal relief. Whether, in fact, there were any unsurrendered copyholds, might be matter of discovery—but the remedy is at law.

There is a statement that the testator had contracted for the purchase of certain estates, of which no conveyance had been made to him, without saying whether before or after the will, or at all pointing to any relief to be grounded on that statement; nor can I guess at any that could be administered in this suit.

The only remaining part of the prayer is, "that the "executors may be restrained from interfering with "the personal estate, and that the receiver of the real "estate may also be the receiver of the personal "estate." It is observable, that this prayer is wholly indefinite. It is not for any particular period, or during the dependence of any particular suit, that the injunction and the receivership are prayed for. The Court has, in several instances, appointed a receiver of personal estate pending a suit in the Ecclesiastical Court—but, in every case in which it has done so, it has appeared that such a suit was depending, whereas there is no such statement in any part of this bill. All that is stated is, "that the executors have not yet proved the "will, though they have attempted to do so." What the

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the obstacle was does not appear. It may now be removed. It is not stated that the next of kin have entered a *caveat*, or taken any step that would produce a suit. The ground of this Court's interference is, that when a suit is depending, the property must remain to a degree unprotected, till its determination. If the will stands, the plaintiff is a perfect stranger to the personal estate; for he is neither a creditor, nor a legatee. Why, therefore, is the Court to take care of the personal estate at his instance? The ground can only be, that there is a question somewhere depending, in the result of which it may appear that he is interested in the personal estate, inasmuch as the will may be set aside. But this plaintiff does not state that there is any such question, either depending, or about to be raised. He, therefore, can have no right to have a receiver of the personal estate appointed. The result then is, that there is no part of the bill, as to which the plaintiff has shewn himself entitled to any relief. And, although (as I have already said) he might have had a right to some of the discovery that is sought, if he had sought nothing more, yet it is now settled that, to support a general demurrer to a bill seeking both discovery and relief, it is sufficient to shew that the plaintiff is not entitled to the relief which he prays.

The demurrer in this case must, therefore, be allowed.

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Testator directs 20,000*l.* which he has in the 3 per cents. *to be firmly fixed*, there to remain during the life of his wife, for her to receive the interest; and after her death *to be in the same manner firmly fixed* on the infant *W. C.* "to be so "secured that "he may only "receive the interest during his life; and, after his decease, to the heir male of his "body, and so on in succession to the heir at law, male or female:" with a direction that the principal sum is never to be broken into, but the interest only to be received, "his intent being that there should "always be the interest to support the name of *Cobb* as a private gen-"tleman."

Though the intention be manifest to give only a life-interest to *W. C.*, yet there being nothing to shew that the words "heir male" was not used in a strict technical sense, *held* that *W. C.* took the absolute interest, the words being such as would create an estate tail of freehold property.

Secus, if the words "for life" had been added to the words "heir male," in which case the latter words might have been construed to be a mere *designatio personæ*.

Held, the declaration that the principal stock should not be broken into, not sufficient to turn the heir into a tenant for life, being like an attempt at perpetual restraint of alienation, which, in the case of land, would not prevent the creation of an estate tail.

JOHN COBB, by his will, after giving several specific bequests to his wife, declared it to be his will that a full and clear account should be made out of the 12,000*l.* which he then had in the 3 per cents., together with all his bonds, notes of hand, his houses therein mentioned, and also of his book-debts and stock in trade, so that the total might appear in one sum, and then "that the one half of the whole amount might "be put into the funds, and there fixed and secured in "the firmest manner, so that it might be only payable "to her own receipt." He afterwards made a codicil to his will, as follows: "My fortune being altered since "my writing the first part of this paper, this is what I "desire may be done in case of my death, (viz.) Let "20,000*l.* out of the 22,000*l.* which I now have in the "3 per cent. stocks, be firmly fixed and there to re-

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" remain during the life of my wife, for her to receive " the interest for the same, and to be payable only to her " own receipt, which at this time will make the amount " of 600*l*. per annum. And it is also my will and de- " sire, that after the death of my wife, then the said " 20,000*l*. which was settled upon her, be in the same " manner firmly fixed upon the now infant boy *William* " *Cobb*. I say, I would have it so secured that he may " only receive the interest of the same during his life " and after his decease to heir male of his body and so " on in succession to the heir at law, male or female. " But let it be noticed, that the principal 20,000*l*. " stock is never to be broken into, but only the interest " to be received as aforesaid; my intent being that there " should always be the interest aforesaid to support the " name of *Cobb* as a private gentleman."

The question was, Whether, according to the construction of this codicil, *William Cobb* therein mentioned took the absolute interest in the 20,000*l*., or only a life interest in the same.

Sir *Samuel Romilly* and *Shadwell*,

Wetherell, *Rose*, and *Wilbraham*,

Bell and *Preston*,

And *Heald*,—for several parties interested, in support of the proposition that *William Cobb* took an absolute interest in the 20,000*l*.

The only question is, whether the words used in this codicil, if applied to real estate, would have made an estate tail; and this point is decided in the affirmative in the case referred to by *Coke* (*a*), where he says, " of

(*a*) Co. Litt. 22. a. In a note on the passage, Mr. *Hargrave* refers to *Richards* v. Lady *Bergaverny*, 2 Vern. 525.

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all the estates taile most coarcted or restrained that I find in our bookes, is the estate taile in 39 Ass. p. 20, where lands were given to a man and his wife, and to one heire of their bodys lawfully begotten, and to one heire of the body of that heire only."

Then, if the words, applied to freehold property, would create an estate tail, they give the absolute interest in personalty, according to the rule in Lord *Chatham* v. *Tothill.* (*a*)

The testator has meant, what by the rules of law he cannot accomplish—namely, to give a life interest to the heir at law for the time being. In attempting this, he has used words which are strictly words of limitation, and give the absolute interest. In such cases, the Court rejects the particular intention, in order to give effect to that which the law has declared to be the general intention; and that is to be presumed from the words which he has employed. *Blackburn* v. *Stables* (*b*) is in point.

Hart and *Hall*, contrà.

The case of *Blackburn* v. *Stables* is wholly inapplicable to the present. There was nothing whatever in that case to prevent the words from being taken in any other than their strict legal acceptation—"no express estate "for life given to the ancestor—no clause, that the estate "should be without impeachment of waste—no limit-"ation to trustees to preserve contingent remainders—"no direction so to frame the limitation, that the first "taker should not have the power of barring the entail. "Every thing was wanting that had furnished matter

(*a*) 6 Bro. P. C. 450.

(*b*) 2 Ves. and B. 367— See *Marshall* v. *Bousfield*, 2 Madd. 166.

"for

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"for argument in other cases." Here, on the contrary, all we are bound to shew, is, that there is no principle on which to enlarge the estate given to *William Cobb* expressly for the term of his life.

Now, a devise of freehold estates, by words similar to those employed in this case, would not create an estate tail in the first taker; because, the person designed to take upon the death of *William Cobb* being his heir male, and the person designed to take in succession after such heir male being heir both male and female, the testator has thereby manifested his intention that the heir male of *William Cobb* is the stock from which the inheritance is to spring—the foundation, from which the line of succession, including the male and female issue, is to commence.

But, supposing these words, if applied to freeholds, would create an estate tail, still this would be a case of exception to the general rule that the same words which create an estate tail of a freehold estate will give the absolute interest if applied to personalty; because that rule is confined to cases where the words of limitation are clear and unequivocal words of inheritance, and is not to be extended by analogy to cases where an estate tail of freehold estate would be raised only by construction. Thus, a bequest to *A.* for life, with remainder to the heirs of his body, must be taken to pass the absolute interest, because the same words, in case of a devise, are clear and technical words of inheritance; but, under a bequest to *A.* for life, with remainder to his issue, it has been held that only a life interest passes to *A.* although the same words, in a devise of land, have been construed to give an estate tail. *Warman* v. *Seaman* (*a*),

(*a*) Finch, 279. 2 Cha. Ca. 209.

 Clare

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Clare v. *Clare* (*a*). The reason is, that the former words necessarily comprise all descendants of the first taker, and, by a long established rule of law, are to be considered as strictly and essentially words of limitation. But the word "issue," or the words "heir male" in the singular number, does not of necessity include the whole line of descent, and, when held to do so, it has been by virtue of the desire to give effect to the presumed intention of the testator; whereas, to extend that operation of the words to the case of personal property so as to vest the absolute interest in the first taker, would be to defeat the intention and so to counteract the very reason upon which the rule was founded. See also *Knight* v. *Ellis* (*b*), *Seaward* v. *Willock* (*c*).

Besides, suppose this were a case of real estate, and that the effect of the words must be taken to give an estate tail, yet in the present case they would operate upon an executory trust: for the testator has expressly directed the property to be so settled or secured that *William Cobb* shall only have the income during his life; and there can be little doubt that this Court, in directing a settlement to be made (whether it be considered as real or personal estate) would take care to confine the interest of *William Cobb* to a life estate.

Benyon, for some of the younger children.

Sir S. *Romilly*, in reply.

There can be no doubt as to what was the intention in this case—that all the descendants of the first taker

(*a*) Ca. Temp. Talb. 21. Fearne's Ex. Dev. 200. 308. and see the arguments on this subject in *Brouncker* v. *Bagot*, ante, Vol. I.

(*b*) 2 Bro. 570, 578.

(*c*) 5 East. 198.

should

should enjoy the property in perpetual succession. But we are not, in construing wills, to ask what the testator actually intended; but how, and by what words, has he expressed his intention?

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The case of *Seaward* v. *Willock* is no authority to govern the present case. *Clare* v. *Clare*, and *Knight* v. *Ellis*, are upon the word "issue;" and in the latter case it was distinctly admitted, that if the word had not been "issue," but "heir," it must have been otherwise decided.

But they say, this, in the case of land, would be an executory devise. How, then, would the Court direct a settlement so as to meet the presumed intention of the testator? Not by giving an estate for life only to *William Cobb*, with remainder to such person as shall be his heir male at the time of his decease; for that would be to defeat the intention, which is to include the heir female, as well as male, in the line of succession: not by carrying into effect the ulterior trust for descendants of the first taker; for that would be contrary to the rule of law, and void for remoteness. But, by giving to the first taker the absolute interest, the general intention, which is to include the whole line of descendants, will be effected; the words of gift will have their legal operation; and nothing will be frustrated but the particular restriction, which is inconsistent with the rules of law, and therefore void.

As to the argument from the use of the word "settling," that word means no more than effectually *securing* the property, by investing, or keeping it invested, in the public funds.

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If this had been a devise of land, the words used would have created an estate tail. I do not conceive that the testator, in using the word "secured," as he does in this will, had any reference to a further or future settlement to be made of the money; and, if he had, I do not see that there is any thing which would authorize the Court to make the settlement in any manner different from that which he has himself directed. He gives an estate for life to *William Cobb;* and he certainly meant that *William Cobb* should have no more than a life interest: but that is of no consequence, if he also meant that the heir male should take in the character of heir. Now there is nothing to qualify the words "heir male," or to shew that they were not used in their strict technical sense. On the contrary, it is evident that the testator conceived he could make a perpetual entail of the property, so as to make it pass from heir to heir in succession; with a condition, however, which he also conceived he could impose on the power of disposition. The "heir male" is to take in the first instance, in the same manner as the "heir male or female" is afterwards to take; for he says, "to the heir male of his body, and *so on in succession* to the heir at law, male or female;" so that he has inheritance alike in view with regard to them all.

It would have been otherwise if he had added the words "for life" to the words "heir male." Then the case would have been the same as that of *White* v. *Collins* (*a*), where, after an estate for life to *F. M.* there was a limitation to the "heir male of his body lawfully begotten *during the term of his natural life.*" This was held to be no estate tail in *F. M.* because

(*a*) 1 Com. 289.

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of the superadded words. It is in this particular, also, that the case (which was cited) of *Seaward* v. *Willock* (a), wholly differs from the present. There, the testator had in express terms restricted all the takers to estates for life, and the word "heirs" was inserted only for the purpose of designating the several persons who were to take such life estates. Here there is no such qualification. It is, indeed, declared, that the principal stock is never to be broken into, but only the interest to be received. But that is not sufficient to turn the "heirs" into tenants for life. It is equivalent to a declaration that no heir shall alien the estate, but only receive the rents and profits. But we are not to say that a testator has not given an estate tail, because he conceived he could perpetually restrain alienation.

Whatever would, *directly* or *constructively*, constitute an estate tail in land will pass an absolute interest in personal estate.

Assuming that, in the case of a devise of land, this would amount to an estate tail, I apprehend it to be settled ever since the case of Lord *Chatham* v. *Tothill* in the House of Lords (b), that whatever would, *directly* or *constructively*, constitute an estate tail in land, will pass an absolute interest in personal estate. There, the dividends only were given for life, and it was evident that the first taker was intended to have no more than a life interest; but there was nothing to qualify the words "heirs of the body," and therefore the interest was held to be absolute in the first taker.

In *Bradley* v. *Peixoto* (c), the testator had inserted a clause of forfeiture in case of any attempt at alienation, and had declared that the dividends were bequeathed

(a) 5 East. 198.
(b) 6 Bro. P. C. 450.
(c) 3 Ves. 324.

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to the different takers for their support during their lives; yet, as he had at first used words of limitation that were held to amount to a gift of the principal as well as the interest, the clause in restraint of alienation was considered as repugnant, and the whole fund was given to the first taker.

I conceive that in this case, *William Cobb* took an absolute interest in the fund.



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Aug. 4.

HOLYLAND and Others,
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Agreement, on dissolution of partnership, that the continuing partner shall, in consideration of an assignment to him of the partnership property, including a lease of the premises on which the business was carried on, secure to the retiring partner the payment of an annuity, by bond, conditioned to be void on payment of the annuity, "or in case he should at any time after the expiration of the then existing lease be dispossessed of and compelled to quit the premises, without any collusion, contrivance, act, or default of his own." The continuing partner obtains a renewal of the lease, and afterwards becomes bankrupt, and the renewed lease passes under the assignment of his estate.

This is not such an eviction or dispossession as was contemplated by the agreement, in the event of which the annuity was to cease.

GEORGE HUDSON died on the 30th of *December* 1799, intestate, leaving *Elizabeth Hudson* (after-

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wards *De Mendez*) his widow, *James Hudson* (his eldest son by a former marriage) and several children by his wife *Elizabeth*, and being possessed, at the time of his death, of a house, wharf, and premises, on which he carried on the business of a coal-merchant, under an agreement for a lease of twenty-one years from *Midsummer* 1786. *Elizabeth Hudson* the widow took out administration, and she, together with *James Hudson*, carried on the trade, in partnership, upon the same premises, till 1801, when the widow married *De Mendez*, soon after which they agreed that the partnership should be dissolved, and the trade relinquished in favour of *Hudson*, to whom *De Mendez* and his wife should assign the premises, and all the goods and chattels to which she had become entitled as administratrix, and also all the partnership stock in trade, &c.; in consideration whereof *Hudson* should pay to *De Mendez* the sum of 525*l.*, and also secure to be paid to trustees for the use of *De Mendez* and his wife, for the support of themselves and the children of both her marriages, an annuity of 250*l.* to be payable during the life of *Hudson*, in the manner and with the condition after mentioned, to be secured by his bond and assignment of the premises as after mentioned.

In order to carry into effect this agreement, an indenture dated the 1st of *January* 1802, was entered into and executed between the parties, whereby it was declared that the partnership was dissolved; and, in consideration of 525*l.* paid by *Hudson*, and of his securing the said annuity as after mentioned, *De Mendez* and his wife assigned the premises so agreed to be assigned to *Hudson*, his executors, &c. absolutely, for his and their own use and benefit; and *Hudson*, thereby, for himself, his heirs, executors, &c. covenanted in manner following, *i. e.* that "he would forthwith use his greatest and utmost en-

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"deavours to procure a lease of the premises at his own "costs, &c. pursuant to the agreement under which the "same were then held, and, when necessary, to obtain "a renewal thereof for the further term of 21 years, "at the like costs, &c.; and likewise would, at the re-"quest and costs, &c. of *De Mendez* or his wife, or of "*Smith* and *Kirton* (trustees), or the survivor, &c. well "and effectually assign and assure the premises to *Smith* "and *Kirton*, or the survivor, &c. for the remainder "which should be then to come of the then existing or "any renewed term, for the better securing of the an-"nuity of 250*l.* thereby agreed to be paid and secured "by bond, as after mentioned." And by bond, of even date with the said indenture, *Hudson* became bound to *Smith* and *Kirton*, in the sum of 2000*l.*, with a condition to be void, if the said *Hudson* should well and truly pay the said annuity of 250*l.* as therein mentioned, "or in case he should use his greatest and utmost ex-"ertions and endeavours to procure a renewal and "fresh grant or lease for 21 years in the premises, and "should, at any time after the expiration of the then "unexpired term, be dispossessed of and be compelled "and obliged to leave and quit the premises, without "any collusion, contrivance, consent, act, or default, "of him the said *James Hudson.*"

This annuity was further secured by a warrant of attorney to confess judgment, which was entered up on the bond, *Hudson* at the same time executing to *De Mendez* another bond of indemnity against the debts and engagements of his father *George Hudson* and of the partnership. And by another indenture of the same date with the preceding, the trusts of the annuity were declared according to the agreement, and the same was directed to be paid *De Mendez*, during his life, or so long as he should continue solvent, and, upon his death.

or insolvency, to *Elizabeth* (his wife) for her life, for the support and maintenance of herself and children, free from the controul or engagements of her said husband.

Upon the execution of these several instruments, the agreement for a lease was deposited with the trustees (*Smith* and *Kirton*); and afterwards, on the 6th of *October* 1802, *Hudson*, in consideration of 200*l*., obtained a lease for 21 years from *Midsummer* 1807. On the 20th of *February* 1813, he became a bankrupt, having regularly paid the annuity up to that time; and the plaintiffs, *Holyland* and others, having been appointed assignees, became possessed of the premises, and of the said lease thereof, by virtue of their assignment.

The bill filed by the assignees, alleging that the several securities for payment of the annuity had become void by *Hudson*'s bankruptcy and the assignment of his estate, under the clause by which the same was made no longer payable after he should become dispossessed of, or compelled to give up, the premises, prayed a declaration accordingly, and that the said securities might be delivered up to be cancelled, and the judgment on the said bond and warrant of attorney vacated, and an injunction to restrain the defendants, *De Mendez* and his wife, and their trustees, from proceeding at law in respect thereof.

De Mendez the husband, having become bankrupt, and residing abroad out of the jurisdiction, a cross bill was filed by the wife and children against *Hudson*'s assignees, and against the trustees of the deeds of 1802, and the assignees of *De Mendez*, alleging that *Hudson*'s act of bankruptcy was fraudulent, and the commission against him a concerted commission, and that his assignees were bound by his covenant to execute an assignment of the

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new lease for securing the annuity, claiming therefore to have a lien on the premises in equity for the annuity, and praying a declaration accordingly, an account and payment of the arrears, and an assignment.

Hart, *Cooke*, and *Pugh*, for the plaintiffs in the first cause (the assignees of *Hudson*), insisted that the bankrupt having been dispossessed by his bankruptcy, the only question that could remain was, whether that bankruptcy was fraudulent. *Shee* v. *Hale* (*a*) was upon the distinction between an assignment under an act of bankruptcy, and under the insolvent act; the latter being voluntary.

Sir *S. Romilly* and *Roupell*, for the plaintiffs in the cross cause, (Mrs. *Mendez* and her children),—

The only question is as to the effect and construction of the bond. It was never contemplated that, because an act of bankruptcy might be committed, by reason of which *Hudson* would cease to be personally liable for the payment of the annuity, his assignees should not continue liable. In the condition of this bond, the word "default" is introduced, which did not occur in *Shee* v. *Hale*; and this answers the distinction made between the cases of assignment by bankruptcy, and by virtue of the insolvent act. The "default" has been incurred by the act of bankruptcy. The assignees are not entitled to retain the annuity and also keep possession of the premises.

Matthews, for the trustees.

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The condition is very unskilfully worded; but not so much so as to render it difficult to guess at the inten-

(*a*) 13 Ves. 404.

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tion. It was in the contemplation of the parties that the premises might, or might not, continue to be of value to *Hudson*, to whom they were assigned; and that the event of their so continuing, or not, might depend either on *Hudson* himself, or on another person. If then *Hudson* chose to take the premises, he was, in so doing, to contract the obligation of paying the annuity; but in case of his being turned out of possession, the annuity was to cease, because it was granted by him in consideration, only, of his enjoyment of the premises. It is hardly supposable that the parties to the transaction could have meant to provide, by the condition entered into, for the event of bankruptcy. It is at least extraordinary, if it were so, that such event was not expressly mentioned or referred to. On the contrary, it seems that the species of dispossession in contemplation was a compulsory eviction; and they meant to provide that, if *Hudson* should be evicted, not through any fault of his own, he should no longer be burthened with payment of the annuity. The assignees of a bankrupt do not take by a title superior to the bankrupt's own; and the property is vested in them only for the benefit of the creditors. After the discharge of the debts, it reverts to the bankrupt himself, or to his representatives. The expulsion intended to be provided for, was such an expulsion as would leave *Hudson* no benefit from the premises. Here he is constantly deriving a benefit from them in the payment of his creditors, and by means of them he may hereafter become perfectly solvent. It is as his property that the assignees possess them, and it is to the satisfaction of his engagements that the profits are applied. I am therefore of opinion that, according to the true construction of this bond, the event has not happened upon which the annuity was intended to cease.

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ROLLS.
Feb. 19. *Aug.* 11.

WILLIAM RANDALL, and GEORGE RUSSELL, SUSANNA RUSSELL, and ANN RUSSELL, Infants, - - - PLAINTIFFS;

AND

SUSANNA RUSSELL, Widow, and Another, DEFENDANTS.

Testator gives "all his stock of cattle, horses and carriages," to his wife absolutely; and gives his farm "*and stock and crop thereon*," to his said wife during widowhood.

Held, the live stock upon the farm given to the wife during widowhood, passed to her absolutely under the former clause.

Testator, seized in fee of a moiety of an estate at *L.*, and in possession of the other moiety as tenant from year to year to *St. J. College*, (his lease from the College having expired,) gives to his wife, *durante viduitate*, "all that his messuage or tenement, with the farm and lands at *L.* and all his estate and interest therein, she paying the rent reserved to *St. J. College*," &c. The widow, after his death, obtains a new lease, and subsequently purchases the reversion of one to whom it had been conveyed by the College under an act of parliament. *Held*, that the renewed lease was taken subject to the trusts of the will, and those in remainder to contribute to the fine paid by the widow in proportions to be settled by the Master.

Held, that the purchase of the reversion, not from the College, but from the person to whom it had been conveyed by the College, was not, under the circumstances, to be taken subject to the trusts of the will.

Quære, If the purchase had been from the College itself.

THIS case arose on the following clauses in the will of *George Russell*, which was duly executed to pass real estates.

"I give and bequeath all my household furniture, goods, plate, linen, china, books, pictures, implements and utensils of household, and all such wines, liquors and provisions, as shall be in and about my house at my decease, and also all my stock of cattle, horses and carriages, and also the harness, furniture and trappings, thereto belonging, unto my wife *Susanna Russell*, her

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executors, administrators, and assigns, absolutely, to and for her and their own use and benefit. Also I give and bequeath all that my messuage or tenement, with the farm and lands (and stock and crop thereon) called *Longlands*, situate and being at *Foot's Cray*, with the appurtenances, and all my estate and interest therein, unto my said wife *Susanna Russell*, and her assigns, for and during her natural life, if she shall so long continue sole and unmarried, she paying and discharging the rent payable to *Saint John's College*, *Oxford*, and all other outgoings for the same, and keeping the dwelling-house insured and in good and tenantable repair." And, after the death or second marriage of his said wife, the testator gave the said messuage or tenement, lands and premises, to the persons thereinafter mentioned, as trustees of his freehold and copyhold estates, "to the same uses, trusts, intents and purposes, as hereinafter mentioned concerning my other freehold and copyhold lands, tenements and hereditaments." And, after giving other benefits to his said wife, he gave, devised, and bequeathed all his freehold and copyhold messuages, lands, &c. with their appurtenances, to the plaintiff *Randall*, and the defendant *Handyside*, their heirs, &c. upon trust that they (his said trustees) should receive the rents and profits, and after payment of a certain annuity thereout, and subject thereto, to lay out and invest in real or government securities, the interest thereof, to accumulate so long as his children (the infant plaintiffs) should continue under 21, and to be considered as part of his residue; and in case his son, the plaintiff *George Russell*, should live to attain 21, then to stand seised, &c. of his said freehold and copyhold messuages upon trust for the said *George Russell*, his heirs and assigns for ever; in case of his death under 21, for such other son as the testator might have who should first attain 21; and in case he should have no

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son who should live to attain 21, for his daughters, as tenants in common in tail, with an ultimate remainder for the testator's own right heirs.

The testator was, at the time of making this will, and of his death, seised in fee of one moiety of the estate called *Longlands*, and in possession of the other moiety of the same estate, as tenant from year to year to *St. John's College, Oxford:* the original lease, under which he held the same at a certain reserved rent, having expired. After his death, the defendant (his widow) entered on the whole estate, and procured a new lease to be granted to her for fourteen years, at a rent of 40*l.*, in consideration of a premium of 400*l.*

Afterwards, by an act of parliament "for effectuating an exchange" between the said college and *Christopher Hull*, Esq., this undivided moiety (among other lands belonging to the College) was vested in the said *Christopher Hull;* who agreed to sell to the defendant the reversion expectant on the determination of her lease from the college; and the same was duly conveyed to her accordingly, by indentures dated the 20th and 21st of *July* 1809.

The bill prayed an account of the stock and crops on the estate at the time of the testator's death, and a declaration "that the defendant (the widow) having had an opportunity of purchasing the said undivided moiety by reason and in consequence of the interest she acquired in the property in question under and by virtue of the will, the testator's estate was entitled to the benefit of such purchase; that, accordingly, upon being repaid the consideration money, the defendant might be declared a trustee of the premises for the benefit of the persons interested, and be decreed to do all necessary

necessary acts for conveying the same; but, in case the Court should be of opinion that the defendant was at liberty to purchase, and did purchase, the inheritance of the said undivided moiety for her own benefit, then that the lease previously taken by her might be declared to be subject to the trusts of the will, and, as the term thereby granted had merged in the freehold and inheritance, that she might be decreed to grant a new lease to the trustees upon the trusts of the will, for so much of the term as would have been expired if she had not purchased the inheritance.

Hart, *Cooke*, and *Seton*, for the plaintiffs.

Fonblanque and *Wingfield*, for the defendants.

[The questions raised were so fully discussed in the judgment which was afterwards pronounced, that it seems unnecessary to make any other statement of the arguments.]

The MASTER *of the* ROLLS.

August 11.

The first question in this case is, under which of two clauses in the will the live stock on the testator's farm is comprehended — whether under that which gives an absolute interest to the widow, or that which gives her only an interest for life in the articles bequeathed to her.

[His Honour here read the clauses in question.]

The plaintiffs say, that the live stock used upon the farm does not pass to the widow absolutely, under the words "stock of cattle and horses," but only for life, under the word "stock," in the second of these clauses. That, to be sure, is a strong proposition; for it is saying, that, by the words "stock on the farm," cattle and horses are more properly designated, than by the

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very words, "cattle and horses." If the testator had spoken of horses, only in conjunction with carriages, he might be supposed to mean carriage horses, and not farm horses—but he gives, not merely his cattle and horses, but "all his *stock* of cattle and horses." Unless, therefore, it can be contended, that his farm stock is not his stock, or that all his stock means something less than his whole stock, I do not see how the plaintiffs can succeed in this part of their claim.

On the second clause, a question arises, as to the nature of the interest, which the widow, as tenant for life, takes in articles, (such as corn and hay,) of which the use consists in the consumption. I doubt whether the testator really intended to confine her to a life interest in such articles: but the words, "during her natural life," are thrown in at the end of the clause; and I do not know how to restrain their application to any particular part of it.

A specific bequest, for life, of things *quæ ipso usu consumuntur*, is a gift of the property and there can be no limitation over after a life interest in such rticles: but if included in a residuary bequest for life, they must be sold, and the interest enjoyed by the tenant for life.

In *Porter* v. *Tournay* (a), Lord *Alvanley* says, "There "has been a great doubt among Judges, what a person, "having a limited use of such articles, must do. Some "learned Judges have thought, that they must be sold, "and that a person so entitled is to have only the interest "of the money. That," he adds, "is a very rigid "construction." It is, however, what is contended for by the plaintiffs in the case now before me. My conception is, that a gift for life, if specific, of things "*quæ ipso usu consumuntur*," is a gift of the property; and that there cannot be a limitation over after a life

(a) 3 Ves. 311.

interest

interest in such articles. If included in a residuary bequest for life, then they are to be sold, and the interest enjoyed by the tenant for life. Originally we know that, by our law, there could be no limitation over of a chattel, but that a gift for life carried the absolute interest. Then a distinction was taken between the use and the property. The use might be given to one for life, and the property afterwards, to another.

When the use and the property can have no separate existence, the old rule must prevail, *viz.* that a gift for life carries the absolute interest.

A gift for life of a chattel is now construed to be a gift of the usufruct only. But, when the use and the property can have no separate existence, it should seem that the old rule must still prevail, and that a limitation over, after a life interest, must be held to be ineffectual. But I do not see how any definite declaration can be made on this subject, until it shall be ascertained of what the crop and stock on the farm consisted at the time of the testator's death. On that point some inquiries must be directed.

In this case, where the gift was of a leasehold farm, and the stock and crop thereon, an inquiry was directed, to ascertain of what the stock consisted.

It has been seen, by the clauses I before read, that the testator gave his farm at *Longlands* to his wife, during her widowhood. Out of this bequest two questions arise.

I. The testator was seised in fee of an undivided moiety of this estate of *Longlands*. The other moiety belonged to *St. John's College, Oxford;* but the testator was lessee, under the College, of that moiety also. The lease, it seems, had expired before the testator's death; but he continued to occupy, as tenant from year to year; and, in the year 1807, the widow (the tenant for life) obtained a lease from the College, in her own name, for a term of fourteen years.

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It is made a question, whether this renewed lease is subject to the trusts of the will, or the absolute property of the widow. On that point, however, I do not see how any doubt can be entertained.—According to the case of *James* v. *Dean*(*a*), the testator had a devisable interest in the premises, and the new lease became subject to the same trusts on which that interest was devised. It was attempted to take a distinction, in this respect, between a renewal by a tenant for life, and a renewal by a trustee or executor. But that the principle of what is commonly called the *Rumford market* case (*b*) applies to a tenant for life, as well as a trustee or executor, was determined in *Foster* v. *Marriott* (*c*), and *Rowe* v. *Chichester* (*d*). It is true that, in the latter case, *Mrs. Rowe* was executrix, as well as tenant for life: but it was not her character of executrix, but of tenant for life, that gave her the opportunity of renewing. In *Pickering* v. *Vowles* (*e*), Lord *Thurlow* takes the point to be settled. In the present case, the greatest part of the renewed term is already expired; and the widow may herself exhaust the whole interest. The plaintiffs will not, therefore, in all probability, derive much advantage from the decision of this point in their favour. They have, however, a right to a declaration, that the renewed lease is subject to the trusts of the will; and it must be settled by the Master, what proportion of the fine paid on renewal is to be borne by them.

II. It appears that, after the lease was granted, the College, under the authority of an act of parliament, conveyed

(*a*) 11 Ves. 383. 15 Ves. 236.

(*b*) Sel. Ca. Cha. 61. *Reech* v. *Sandford*, so called. See Ambler, 719.

(*c*) Ambler, 668.

(*d*) Amb. 715. 1 Bro. 198. note. And *Owen* v. *Williams*, Amb. 734. 1 Bro. 199, note.

(*e*) 1 Bro. 197.

veyed this estate to a Mr. *Hull* in exchange for some property of his, and he sold the reversion in fee to Mrs. *Russell*.

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On the part of the plaintiffs, it is contended, that the reversion so purchased is also subject to the trusts of the testator's will. But the bill does not state to which of those trusts it is conceived to be subject, or for whom this estate is claimed. The testator has given his freehold and his leasehold property in different ways. The eldest son is sole devisee of the freehold estates; all the children are entitled to the leasehold and personal property. To the eldest son, separately, no interest whatever is given in this moiety of the estate. Such interest as the testator had in it, he divided between the wife and all the children. The eldest son, surely, cannot say, that any further interest acquired in that estate is to belong exclusively to him. The widow has purchased no interest in any estate that was limited to him by the will, and therefore cannot be a trustee for him. I presume, then, it is for all the children that the fee is claimed, as coming in the place of the leasehold interest, of which they had the remainder.

No case was mentioned, in which this sort of equity had been carried to such a length. The ground commonly stated, on which the renewed lease becomes subject to the trusts of a will disposing of the original lease, is, that the one is merely an extension or continuation of the other. But the fee is a totally different subject, which the testator had it not in his contemplation to acquire or dispose of. Yet, if Mrs. *Russell* had purchased from the College, it might be said, that she thereby intercepted and cut off the chance of future renewals, and, consequently, made use of her situation to prejudice the interests of those who stood behind her;

and

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and there might be some sort of equity in their claim to have the reversion considered as a substitution for those interests; although, as I have already said, I am not aware of any decision to that effect. But, here, the situation of the parties was altered by the act of the landlord, without any intervention of the tenant for life. The College had aliened the property to an individual. The benefit attending the tenant-right of renewal with a public body was gone. A lease at a rack rent was all that was to be expected from the private proprietor. Mrs. *Russell's* purchase from the first vendee wrought no change whatever in the situation of those who had had interests in the lease as a College lease. Before she bought, it had become a lease that must expire at the end of fourteen years. Whether Mr. *Hull* sold or kept the reversion, was a matter of indifference to them. It is not enough to say that Mrs. *Russell's* situation, as tenant for life, gave her the opportunity of making the purchase. They must go on, and shew, what right or interest of theirs she acquired or defeated, by making the purchase. There never was a stronger case for turning the purchaser of a reversion into a trustee for those who had the antecedent interests in the estate than that of *Norris* v. *Le Neve* (a). *Norris* was the executor of the testator's will: he was also trustee of a term for payment of debts. He had had the management of the testator's affairs, and was in possession of all his deeds. The testator had made different limitations of his estate, for life, and in tail, with an ultimate remainder to his own right heirs. *Norris* found out the right heir, and obtained from him the reversion, for a small sum of money. The persons who had the limited interests in the property contended, that this purchase by *Norris*, under such circnmstances, ought to be considered as a trust for them or some of them—and they likened it to

(a) 3 Atk. 26.

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the case of a trustee obtaining the renewal of a lease for his own benefit. Lord *Hardwicke*, though highly disapproving of *Norris*'s conduct, and expressing a strong desire to turn him into a trustee, yet could not find a ground for declaring the purchase to be a trust for those who had nothing at all to do with the reversion. (*a*) In the present case the plaintiffs stood wholly unconnected with *Hull*'s reversionary interest. Whether he sold it to Mrs. *Russell*, or to any other person, was a matter of indifference to them. All they allege is, that, inasmuch as her situation gave her an opportunity to make the purchase, she ought to be turned into a trustee for them. But the case to which I have referred furnishes a sufficient answer to that argument. I think there is even less ground for turning her into a trustee for them, than there would have been for considering *Norris* as a trustee for the parties interested in the estate.

This part of the bill must, therefore, be dismissed.(*b*)

(*a*) 3 Atk. 37 & 38.

(*b*) See *Nisbett* v. *Tredennick*, 1 Ball & Beatty, 29. *Mulvany* v. *Dillon*, Ib. 409. *Winslow* v. *Tighe*, 2 Ball & B. 195. *Eyre* v. *Dolphin*, Ib. 290. See also *Hardman* v. *Johnson*, post.

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Rolls.
July,
Aug. 16.

LYDIA ANN DOWNES, - Plaintiff;
AGAINST
GRAZEBROOK and CHAMBERLAYNE, Defendants.

Conveyance of an estate to *D.* by way of security for the re-investment of a specific sum of stock, and for payment of the dividends in the mean time, with a power of sale in case of default.

Under this deed, *D.* is a trustee for the party making the conveyance, and, as such, disabled from purchasing for himself so long as he continues to be a trustee without the consent of his *cestuy que trust.* Therefore, the estate being put up to sale by auction, at which *C.* as agent for *D.* was the only bidder, and it was knocked down to him accordingly, the sale was decreed not to stand, although no evidence of fraud or undervalue; and not to be supported by evidence of the plaintiff's having known and approved of the sale taking place, and afterwards attempting to damp it, nor of a previous conversation with her attorney in which the latter exhorted the purchaser to bid a good price for the estate to keep up the sale.

Quære, If *C.* had purchased for himself, and not for *D.*, whether the sale could have been supported; he being present in the character of solicitor for *D.* the vendor.

IN the month of *August* 1815, the plaintiff being in want of money to pay off a debt, for which an estate of which she was seised in fee, subject (as was stated in the bill) to a mortgage to the defendant *Chamberlayne*, was also liable under a power of sale to one *Glazier*, applied to the defendant *Grazebrook*, who agreed to lend her the sum of 7200*l.* 3 per cents. upon the plaintiff's undertaking to replace the same on the 15th of *March* following; and in order to secure such re-investment, together with the amount of the dividends in the mean time, to make a conveyance of her estate to the defendant by way of mortgage, with a power of sale in case of default. Accordingly the defendant, at the plaintiff's request, sold the stock, and paid the whole produce (4068*l.*) into the hands of the plaintiff or her attorney; and by indenture dated the 16th of *September* 1815, (which was prepared by the plaintiff's attorney, and under her direction,) reciting that the defendant had

advanced

advanced to the plaintiff the above sum of stock, and had at the request of the plaintiff sold the same, and paid to the plaintiff the net produce thereof to the amount above mentioned, and that it was agreed on the treaty, for and at the time of the said loan, that the plaintiff should secure the said stock to the defendant, together with the dividends thereof as after mentioned, it was witnessed that, in pursuance of the agreement, the plaintiff bargained and sold to the defendant and his heirs the said estate, upon trust for the plaintiff, till default made in the re-investment at the time agreed upon, or in payment to the defendant of all dividends and interest which in the mean time the defendant would have received or been entitled to in case the stock had remained standing; and, after any such default, upon trust to sell by public auction or private contract, and out of the produce in the first place to reimburse himself all expenses, and next to re-purchase the same amount of stock in his own name, and retain to himself all dividends and interest which he would in the mean time have been entitled to if the stock had remained unsold; with a covenant by the plaintiff to re-transfer and pay the dividends accordingly.

In *April* 1816, the defendant demanded payment of two dividends then due, together with a further sum of 18*l.*, which he had since advanced by way of loan to the plaintiff, amounting in all to 234*l.*; and, the plaintiff being unable to pay, he took her promissory note for the amount. The plaintiff having also made default in the re-investment of the stock at the stipulated period, prevailed on the defendant to grant her an extension of the time on the further security of a bond for 200*l.* conditioned for the re-investment on the 1st of *August* following; which bond (dated the 15th of *June* 1816) contained a recital "that the plaintiff then was and stood

"indebted

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" indebted to the defendant in a sum amounting to " 7200*l.* 3 per cents. which the defendant had some time " before sold out and advanced to the plaintiff under " an express stipulation for the re-investment at a cer- " tain day then fixed, which the plaintiff had neglected " to do, and the same together with all dividends " thereon then remained due, and that the plaintiff had " requested of the defendant to give her till the said " 1st of *August* for the re-payment, and, in order to " indemnify its repurchase at that time had proposed to " enter into the said bond." This bond was prepared by the defendant's solicitor, in lieu of one before prepared by the plaintiff's solicitor, which the defendant delivered up to be cancelled as being informal.

At the time stipulated by this bond for the re-investment and payment of dividends, default was again made in both, and the plaintiff then agreed to make to the defendant an absolute conveyance of the estate, for which purpose the draft of a deed was accordingly prepared; but the plaintiff afterwards refused to perform her agreement; and thereupon the defendant brought an ejectment, and caused an affidavit of debt to be prepared, with a design of proceeding to an arrest; to prevent which the plaintiff executed a letter of attorney to enable the defendant to sell the premises, and also signed a warrant of attorney, the condition whereof was, " that no ac- " tion or other proceedings should be commenced or " prosecuted against the plaintiff, her lands and tene- " ments, goods and chattels, upon the judgment to be " entered up in pursuance thereof, unless default should " be made in transferring and replacing the stock, and " in payment of the sum of 324*l.* for dividends already " due on the same, and of all future dividends, toge- " ther with lawful interest on the dividends already due, " from the day on which the last of such dividends

" would

"would have been received if the stock had remained "unsold, and interest on the accruing dividends, from "the time they should respectively become due, to the "day of payment; and also in payment of the costs "of all actions and processes occasioned by the default "of re-investment, and other expenses incident thereto, "to be taxed if necessary: and in case default should "be made in replacing and performing the matters "aforesaid on or before the 1st of *June* then next, and "the estate should be previously sold, and the proceeds "of sale prove insufficient for the replacing and per- "forming thereof, then it was agreed that execution "should issue for the sum of 6000*l*., or so much "thereof as would enable the defendant to replace the "stock on the 1st of *June*, and pay himself the interest, "dividends, and costs, or so much thereof as should "remain unsatisfied out of the proceeds of the estate; "and that the sheriff might levy the same, and also the "costs of entering up judgment, and all other inci- "dental expenses. And it was thereby agreed that, in "the event of the defendant's being obliged to re- "sort to his remedies under the warrant, no execu- "tion should be issued, or action, suit, or other pro- "cess prosecuted against the plaintiff personally under "the judgment, and that, if the proceeds of the levy "should turn out more than sufficient for the pur- "poses aforesaid, then the distress so to be taken "should not be deemed excessive, but all overplus "should be returned to the plaintiff, her execu- "tors, &c. or to whosoever else should be entitled "thereto."

On the 1st of *June*, (the time limited by this warrant of attorney,) default was again made; and thereupon the defendant proceeded to a sale of the estate by public auction, with the knowledge of the plaintiff, and after a previous

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previous consultation with her attorney, who recommended the auctioneer by whom the sale was to be had, and who was a friend of the plaintiff's. At this sale, the defendant, and a Mr. *Clarke*, (as his attorney and agent,) were present, and *Clarke*, as such attorney or agent, bid for the estate 4000 guineas, at which sum it was knocked down to him; the bill stating that, by such bidding on behalf of the defendant, others were deterred, who would else have offered to become purchasers at the sale; the answer, on the contrary, denying such statement, and alleging that, previous to the sale taking place, the defendant was taken by the plaintiff's solicitor into a private room, where, in the presence of the auctioneer, the latter urged him "to bid a good price "for keeping up the sale;" to which the defendant answered that it was not his intention to bid, but that, if he did, it would be in the exercise of his own discretion, and that the estate must be sold. The answer went on to state circumstances, from which it was inferred that the plaintiff had herself so acted as to prevent a sale to any other person; namely, that, on the estate being put up, a person stood forward, and declared that the plaintiff, (whom he had seen that morning,) had declared to him that she would not consent to the sale; that, though the plaintiff's own attorney was present when this declaration was made, and was called upon by the defendant to state that the sale was made with the plaintiff's concurrence, he preserved an obstinate silence; and the same person who made the declaration was afterwards seen in close conversation with the plaintiff's solicitor. The defendant stated his belief that the person in question was sent by the plaintiff or her solicitor to prevent a sale, and proceeded to state that, at the time of *Clarke*'s bidding, no other person had bid, although the estate had been then put up for a considerable time, and no other bidding was afterwards made, although the

auctioneer

auctioneer purposely kept it open more than the usual time.

No notice was given by *Clarke* at the time of the sale, or afterwards, of his attending and bidding on behalf of the defendant.

The bill, charging gross fraud and collusion, prayed a declaration that the deed of *September* 1815 was fraudulent, inasmuch as it purported to secure the retransfer to the defendant *Grazebrook* of the 7200*l.* stock, and the payment of such sums as he would have received for dividends thereupon if standing in his name, and that the same may stand and be a security for such sums only as had been actually advanced and paid by the defendant to or for the use of the plaintiff, with interest;—an account;—the delivery up of the promissory note, bonds, and warrant of attorney, to be cancelled;—an injunction to restrain the defendant from commencing or prosecuting any action on the note or bonds and from causing the Sheriff to make a return to the writ of execution, or further prosecuting the same, or proceeding in the said action, or prosecuting any other action on the covenant in the deed. The bill also prayed an account against *Chamberlayne* (who was stated to be a prior mortgagee);—that the contract entered into by *Clarke* on behalf of *Grazebrook* might be declared void;—an injunction to restrain both the defendants from selling or conveying any of the lands except under the direction of the Court;—and a sale under such direction, with other matters incident thereto.

The answer of the defendant *Grazebrook* denied all the charges of fraud and collusion made by the bill, and all notice of prior incumbrances, insisting on the validity of the several instruments and proceedings so made and entered

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entered into, and instituted; submitting to the Court the question, whether either *Clarke*, or the defendant, could become the purchaser of the estate, and whether the contract so entered into by the former could, under the circumstances of the case, be supported; and claiming the benefit of the statute 4 and 5 *W.* and *M. c.* 16. "for "preventing frauds by clandestine mortgages," on the ground that this was a mortgage to *Grazebrook* without notice of a prior mortgage, if, as the bill alleged, the mortgage to *Chamberlayne* was in fact prior to *Grazebrook*'s.

The plaintiff now moved for an injunction to restrain the defendant *Grazebrook* from commencing or prosecuting any actions on the promissory note and bonds, and from receiving any monies levied in execution of the writ issued as aforesaid, and in like manner to restrain the Sheriff of *Northamptonshire* from paying over to the defendant the monies so levied, until answer or further order; and for an injunction also to restrain the defendant from selling or conveying, or in any manner disposing of, the lands, &c. comprised in the indenture of the 16th of *September* 1815, which were put up to sale by his order, or under his authority.

Bell and *Haslewood*, in support of the motion, insisted on various objections to the securities taken and proceedings adopted by the defendant, as harsh and oppressive, and taking advantage of the situation and distresses of the plaintiff; principally contending that the defendant, as standing in the situation of a trustee, could not be a purchaser — that the sale to a person attending in the character of his agent was therefore void — and that the proceedings which had subsequently taken place, could not be supported, as being contrary to the agreement between the parties, which was that the

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the estate should first be sold, and the other securities resorted to only in case of a deficiency.

Sir *S. Romilly* and *Beames*, for the defendant, resisted the charges of improper conduct, insisting that it was owing to the defendant's forbearance that the estate had not been sold long before, and the former securities made available to their full extent; that the sale was strictly regular, and the purchase actually thrown upon *Clarke* in consequence of the plaintiff's own fraudulent attempts to damp the sale; and, lastly, that the defendant could not be considered, under the circumstances, as a trustee, in the light in which the Court holds a purchase by a person in the situation of a trustee as fraudulent and void.

The Lord Chancellor.

If the question is to turn on whether *Clarke* was a purchaser for *Grazebrook*, or for himself, and it appears that he has a good contract, the case is of so much importance in point of principle that I shall read the answer before I determine it. With regard to the previous transactions, *Grazebrook* might bargain for the retransfer of the stock, and the payment of dividends; but he could not bargain *ab ante* for interest on the dividends remaining unpaid. The warrant of attorney, however, goes that length, and so far it cannot be enforced in a court of equity.

But the great question is on the sale itself, and, as to that, I am of opinion that *Grazebrook* cannot be considered otherwise than as a trustee under the conveyance to him of the estate by the deed of the 16th of *September* 1815. Now a trustee cannot (generally speaking) become a purchaser, either by private contract or publicly; and there is a case in *Vesey*, where it was laid

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down by Lord *Hardwicke*, that such a purchase should not be allowed to stand, although not the trustee himself, but another on his behalf, had bought the estate at a public auction (*a*). I take it, however, that the doctrine is not accurately stated in saying that under no circumstances whatever a trustee can purchase (*b*). *A trustee for sale is bound to bring the estate to the hammer under every possible advantage to his *cestuy que trust*. He may, if he pleases, retire from being a trustee, and divest himself of that character, in order to qualify himself to become a purchaser; and so he may purchase, not indeed from himself as trustee, but under a specific contract with his *cestuy que trust*. But, while he continues to be a trustee, he cannot, without the express authority of his *cestuy que trust*, have any thing to do with the trust property as a purchaser. In order to make the sale in the present case a valid transaction, it is therefore incumbent on Mr. *Grazebrook* to shew that he had such an authority to enable him to become a purchaser at that sale. Now, his answer states the conversation between himself and the plaintiff's solicitor, as amounting to such an authority:

(*a*) *Whelpdale* v. *Cookson*, 1 Ves. 9. and see Belt's Supplement to Vesey for the facts of that case, and for a reference to the later authorities. See also *Webb* v. *Rorke*, 2 Scho. and Lef. 661.

(*b*) See Exp. *Lacey*, 6 Ves. 625. "The rule is, not that a trustee shall not purchase from the *cestuy que trust*, but that he shall not purchase from himself.

"If a trustee will so deal with his *cestuy que trust*, that the amount of the transaction shakes off the obligation that attaches upon him as a trustee, then he may buy.

"A trustee is not precluded from bargaining that he will no longer act as trustee. The *cestuy que trust* may by a new contract dismiss him from that character; but even then the transaction must be watched with infinite and the most guarded jealousy," &c.

but

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but it is at all times a transaction to which the Court will look with the utmost jealousy, and it would be too dangerous to allow the solicitor for the *cestui que trust*, without one word of authority, to bind his employer.

The next question is one of great importance, *viz.* supposing *Clarke* to be the purchaser, whether, under these circumstances, the sale can be enforced. I recollect that Lord *Kenyon* (*a*) would not allow the agent for the vendor to bid at a public auction, upon the ground that such a bidding would have a direct tendency to damp the sale.

THE LORD CHANCELLOR afterwards stated that he had read the answer, and although there was not the slightest ground for imputing to the defendant either fraud, oppression, or harshness of conduct towards the plaintiff, he thought that, consistently with the general rule, the sale to *Clarke* could not stand.

August 23.

The parties then consented to a sale before the Master, and the following order was drawn up:—" That the " sheriff of *Northamptonshire* do, out of the monies levied " by him in the action in the pleadings mentioned, now " in his hands, pay the sum of 200*l.* to the defendant " *Grazebrook* on account of his costs, without prejudice " to the taxation of his bill of costs, or to any other " question in the cause, and do pay the residue into

(*a*) In the case of *Twining* v. *Morrice*, 2 Bro. C. C. 326. And in *Nelthorpe* v. *Pennyman*, 14 Ves. 517. the Lord Chancellor said, " It would be a very wholesome rule to lay down, that the solicitor in the cause should have nothing to do with the sale; as the certain effect of a bidding by the solicitor is, that the sale is immediately chilled."

 " Court.

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"Court. And, *by consent*, that the estates in question "be sold with the approbation of the Master—all parties to join in the sale—to produce deeds, &c.: and "the monies arising from such sale to be paid into "Court, subject to further order."

Reg. Lib. A. 1816. fo. 1609.

ROLLS.
1816.
June 1,
1817.
August 24.

TOULMIN *v.* STEERE. (*a*)

Purchaser having employed the vendor's agent who had notice of an incumbrance, charged with notice, notwithstanding the purchase was made under the sanction of the Court, and an infant was interested in it.

Purchaser of an equity of redemption cannot set up a prior mortgage of his own, or which he has got in, against subsequent incumbrances of which he had notice.

IN *May* 1805, *Ann Simpson*, spinster, purchased of *Richard Witts* an annuity of 180*l.* for three lives in consideration of 2000*l.* The annuity was granted and secured in the usual form, by way of rent charge upon certain lands of which *Witts* was the owner, subject to a mortgage in fee to *Robert Harrison* for securing 5000*l.* and interest, which mortgage was excepted in the annuity-deed. The deed contained a covenant (amongst others) on the part of *Witts* for further assurance; and also a power for *Witts* to repurchase the annuity on payment of 2045*l.* and all arrears.

Mark Noble Daniel acted as solicitor for both parties, prepared the deed, and was one of the subscribing witnesses to it; and so long as the annuity continued to be paid, the payments were made through his hands.

In *August* 1807, *Ann Simpson* intermarried with *Bryan Holme*; on which occasion the annuity in ques-

(*a*) For the statement of this case, and of the arguments, I am indebted to Mr. *Hodgson*.

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tion was assigned to *Toulmin* and *Thomas Butterfield Simpson*, upon certain trusts.

Daniel having become much embarrassed, quitted the country in 1812; up to which time the annuity was regularly paid. But before that time, *viz.* in 1806, *Witts* borrowed of one *Wilby* 3000*l.* on a second mortgage of these premises, and *Wilby* afterwards got in the first mortgage by a transfer from *Harrison*. It did not appear whether *Wilby* had, at the time of his loan, any notice of Mrs. *Holme*'s annuity. In *March* 1810, *Witts* sold the estate to the trustees of the will of *Lee Steere*, who purchased it under the authority of the Court of Chancery, and it was conveyed to the uses of the will; under which uses *Lee Steere Steere* (the son of *Witts*) was tenant for life in possession, and *Lee Steere*, an infant, his son, was tenant in tail in remainder. The mortgages for 5000*l.* and 3000*l.* were paid off out of the purchase money, and *Wilby* the mortgagee joined in the purchase deed and conveyed the legal estate to the uses of the will. *William Haydon* and *Mark Noble Daniel* were the trustees of the will.

The bill was originally filed by *Toulmin* and *Simpson*, the trustees of Mr. and Mrs. *Holme*'s settlement, and their *cestui que trusts*, against *Lee Steere Steere*, *Lee Steere* (the infant,) and *Daniel* and *Haydon* (the trustees;) but, subsequently, by an amendment, the name of *Toulmin* was struck out as a plaintiff, and he was made a defendant. The bill charged notice of the annuity, and prayed a declaration that it was a charge on the lands purchased by the defendants, in preference to the mortgages, and also an account and payment of the arrears: and in case the Court should think the defendants had a right to set up the mortgages, or either of them, in bar of the annuity, it

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prayed that the plaintiffs might be at liberty to redeem the mortgages; that, upon such redemption taking place, the defendants might be decreed to convey the legal estate to the plaintiffs discharged of all equity of redemption, or so that the defendants might not be permitted afterwards to redeem, except on condition of conveying the legal estate to the plaintiffs, and of making such further assurances as might be necessary to enable the plaintiffs to recover their annuity as the first charge on the premises. The bill prayed also an injunction against assigning the mortgages, and a receiver.

It was admitted by the answers of the defendants to the amended bill, and proved by evidence taken in the cause, that *Daniel* acted, in the sale and purchase of the estate, as agent and solicitor for *Witts* the seller, and also for the purchasers.

It was understood that the defendants had no *actual* notice of the annuity; and it was stated that *Witts* the vendor had concealed its existence, but had actually left 2045*l.* in *Daniel*'s hands to redeem it, which *Daniel* converted to his own use.

Bell, *Heald*, and *Hodgson*, for the plaintiffs.

This cause involves two questions. 1. Whether the defendants are entitled to set up the mortgages at all? 2. If they can, then upon what terms the plaintiffs are entitled to redeem?

1. If after executing the annuity deed *Witts*, the grantor, had paid off the prior mortgage, he would have been bound to convey, or charge, the legal estate for securing the annuity. This would have been not only the general equity between the parties, but

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results immediately from the covenant for further assurance in the annuity deed. Then any person claiming through *Witts*, with notice of the annuity and covenant, must stand in the same situation with him. That brings the question to this, whether the defendants had notice of the annuity, and whether they claim the legal estate through *Witts*. As to notice, it is clear they employed *Daniel* as their agent in the purchase, and *Daniel* had complete notice; and actual notice to the agent is constructive notice to the principal: indeed *Daniel* was not only agent, but actually one of the trustees by whom the purchase was made. With respect to the situation of the defendants it is just the same as if *Witts* had paid off the mortgages first, and then sold the estate; because the contract is with him for an estate clear of incumbrances (upon which terms only the estate could be purchased consistently with the trust under which the trustees acted,) and the mortgagee only joined in the conveyance by his direction. There clearly was not, and could not be, any intention to keep the mortgages alive as distinct interests in the estate. It might have been different if the defendants had first taken a *boná fide* transfer for the mortgage, and afterwards purchased the equitable estate: but by the mode adopted, the plaintiffs were shut out of their proper situation as incumbrancers; they were prevented from ever obtaining a conveyance of the legal estate from the grantor of their annuity, and all this by the act of persons having notice of their incumbrance. This is a clear ground for equitable relief, and there is no mode of relief so proper as that of considering them as the only remaining incumbrancers. The cases of *Greswold* v. *Marsham* (*a*), *Brotherton* v. *Hatt* (*b*), *Le Neve* v. *Le Neve* (*c*), *Mocatta*

(*a*) 2 Chan. Cas. 170.
(*b*) 2 Vern. 574.
(*c*) 3 Atk. 265.

v. *Murgatroyd*

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v. *Murgatroyd* (*a*), *Taylor* v. *Stibbert* (*b*), *Crofton* v. *Ormsby* (*c*), *Compton* v. *Oxendon* (*d*), *St. Paul* v. *Dudley* (*e*), are in point. But it will be said this is not the case of a purchase in fee, because here the estate is bought under a trust, and an infant is interested as tenant in tail; and it may be made a question whether an infant can be bound by such a case of notice. Upon principle it seems clear that no advantage could be taken of that circumstance, for it would give the greatest possible opportunity for fraud; and the case of *Huguenin* v. *Baseley* (*f*) is a strong authority against the argument. There the circumstance of an infant being interested under the conveyance, which had been obtained by fraud, was pressed on the Court, but it had no weight. That was, indeed, a case of actual fraud; but there can be no difference in principle between such a case and the present, where the imputation of fraud results directly from the act of the defendants done with notice of the plaintiffs' rights.

2. But if the defendants should be thought to be entitled to set up the first mortgage against the plaintiffs; then we contend that they can go no further than that. That the mortgage to *Wilby* cannot be tacked, for as to that there is no averment that the money was lent without notice of the plaintiffs' security: and it is the acknowledged law of the Court that a party cannot avail himself of his want of notice unless he pleads it. The mode of redemption we contend for, is, that on payment of the 5000*l.* the plaintiffs are entitled to an absolute conveyance of the legal estate, not again redeemable unless on repurchase of the annuity as well as payment of the mortgage money. To decree

(*a*) 1 P. Wms. 393.
(*b*) 2 Ves. jun. 437.
(*c*) 2 Scho. & Lef. 583.
(*d*) 2 Ves. jun. 261.
(*e*) 15 Ves. 172.
(*f*) 14 Ves. 273.

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two redemptions would be merely to introduce confusion, for the purpose of creating expence.

Sir *Samuel Romilly* and *Roupell*, for the defendant *Lee Steere Steere.*

It must be admitted that if *Witts* had paid off the mortgage, and taken a conveyance of the legal estate, he could not have set it up: but the ground of that is, that he was himself the plaintiffs' debtor, and that ground fails as between the plaintiffs and the present defendants. Their purchase was made under peculiar circumstances—sanctioned by the decree of this Court; and therefore *Daniel* was rather the agent of the Court than of the parties. At all events that doctrine must apply so far as the infant is concerned, even supposing *Steere* the tenant for life to be bound.

The only question is, to what extent he is bound. The defendants are entitled to set up the 5000*l.* mortgage, which is actually excepted in the grant of annuity. As to that the plaintiffs are not to be in a better situation than if no sale had taken place. It may be a question whether they can avail themselves of the mortgage for 3000*l.* also. But they would clearly have a right to do so, if that mortgage was originally taken without notice of the annuity; and it is to be remarked, that the plaintiffs do not charge that any such notice existed. The utmost, therefore, which can now be decreed is, that the plaintiffs may be allowed to redeem the first mortgage; and the question will then arise, whether they are not to be redeemed by the defendants in respect of the second mortgage. It is true by the mode of conveyance adopted on the purchase there has been a confusion of the legal and equitable estates. But it is settled

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there can be no merger in equity, which always keeps incumbrances alive, or considers them extinguished, as will best serve the purposes of justice. *Greswold* v. *Marsham* is not in point—no such question arose in that case; and the other cases cited by the plaintiffs' counsel are quoted for doctrines which we do not dispute, but which we contend are inapplicable to the question before the Court. And as to the supposed difficulty of decreeing successive redemptions, the case of *Arcedeckne* v. *Bowes* (*a*) in the Exchequer is one in which the difficulty was greater than in the present case.

Sugden, for the defendant *Lee Steere*, the infant.

This is a very important case, as it affects the doctrine of notice. The plaintiffs contend that we had constructive notice of their security; but it was owing to their own neglect, in not giving notice to the first mortgagee, and requiring a memorandum of their charge to be indorsed on his deed, that we had not express notice. I contend therefore that they have exposed themselves to the loss by their own neglect. But they contend, not only that we are to be charged with their annuity, but that it is to be the first, or only charge, on the estate. In support of this, one principal part of their argument turned on the covenant for further assurance; but it is remarkable that the first mortgage was expressly excepted in the

(*a*) The question in this case, which (it is believed) is no where reported as to that point, was as to the mode of decreeing a redemption where there are several mortgages one behind another; and the Court decreed, in detail, that the second should redeem the first, the third the second, and so on. The case is reported as to another point, 3 Anstr. 752.

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annuity deed: therefore the covenant amounted to a declaration that they were to take an estate then incumbered, and which was to remain incumbered. It is not contended that *Witts* might not have transferred the 5000*l.* mortgage as often as he pleased: therefore the plaintiffs can never be injured by that mortgage remaining a prior charge to theirs. As to the mortgage for 3000*l.*, the question depends upon the notice that *Wilby* had when he lent that sum. It must be taken that he had not notice, because they do not charge that he had. *Hardy* v. *Reeves* (*a*).

I admit that notice to an agent is notice to the principal: but I contend, 1. that it must be notice in the same transaction; 2. That the effect of a purchase by the defendants with notice cannot be to improve the situation of the plaintiff; and, 3. That *Daniel* cannot be considered as agent in this case.

1. The notice must be in the same transaction. *Lowther* v. *Carleton* (*b*), *Warwick* v. *Warwick* (*c*). Then how can it be made out that the purchase in 1810 was the same transaction as the grant of the annuity in 1805? It will be said that the notice to *Daniel* continued so long as the payments of the annuity were made through his hands: but that is not conclusive; he might have paid the annuity without having notice of the nature of the security. *Steed* v. *Whitaker* (*d*).

2. Assuming that the purchase was with notice, that circumstance, though affecting the defendants, ought not to alter the situation of the plaintiffs. This is not a case where fraud can be imputed. The purchase

(*a*) 5 Ves. jun. 426.
(*b*) 2 Atk. 242.
(*c*) 3 Atk. 291.
(*d*) Barnard, 220.

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was not clandestine, but openly transacted in this Court; and the defendants in point of fact knew nothing of the annuity till two years after the purchase was completed. It will be remembered that *Daniel* was the plaintiffs' own agent: and it is surely a novel equity that because we have employed their own agent, they are not only to be relieved, but to be placed in a better situation than if we had not purchased at all. The whole argument on this part of the case resolves itself into a matter of form — that we took our conveyance by one deed, instead of employing several deeds: for it is not denied that the mortgages might have been kept distinct. But although that might be important in a question of merger at law, it can be of no consequence in equity. Here all the cases prove that the merger of an incumbrance is merely a question of intention: and there is therefore no difficulty in the Court's separating the interests, although by the form of conveyance adopted they have been thrown together.

3. I contend that *Daniel* is not to be considered as an agent so as to affect the infant. It is the general principle that an infant cannot act by an agent even where he may be competent to act in person. He cannot suffer a recovery, or levy a fine by attorney. There are certainly some old cases of frauds by infants: but they are cases where the infant has been active in the fraud. *Huguenin* v. *Baseley* (*a*) was a case of actual fraud by the father, and the infant was a mere volunteer under the father. But here the question is very different, namely, whether the infant is to be bound by the notice which the agent had. It is said *Daniel* was the agent of the tenant for life, and that the infant must be bound by his father's act in employing him. But sup-

(*a*) 14 Ves. jun. 273.

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pose a case where there is no tenant for life. Some agent must be employed—not by the infant, but by the Court. The doctrine now contended for could not apply to such a case, nor to the case of *unborn* children; and how does the present case differ in principle? The plaintiffs, therefore, can at most be entitled to relief only as against the tenant for life; and, as against him, only in respect of the equitable interest ulterior to the mortgages.

As to the mode in which the relief is to be given, there is considerable difficulty; but I submit that it may be as follows:

1st. The interest of the mortgage monies to be paid.
2d. The annuity.
3d. The tenant for life to take the surplus rents.
But this only during the life of the tenant for life.

Bell, in reply.

There is no rule that the notice to an agent must be notice in the same transaction, though there are some dicta to that effect; but this was the same transaction. In fact *Daniel*'s agency never ceased; he acted in the purchase of the annuity—he was employed to pay it—and while he was so paying it, he acted as agent in the transaction of the sale. Neither was there any neglect on the part of the plaintiffs. They could not be expected to take any steps with reference to their security, while they were regularly receiving the annuity from *Daniel*, and knew nothing of the sale—a mere family transaction. As to their causing a memorandum to be indorsed on the first mortgage, they had no right to require any such step, and no mortgagee in his senses could be expected to permit it.

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If an infant may have an agent to do things for his benefit, he must be bound by the acts and neglects of that agent to the same extent as if he were adult. If not, it would only to be to get an infant interested, to avoid all the consequences of a fraud. But *Daniel* was not only agent but also trustee, and therefore the notice to him must bind the infant, because he has his remedy against *Daniel*, whereas the plaintiffs have none. And the case would be exactly the same against an unborn tenant in tail.

In the case of *Le Neve* v. *Le Neve*, unborn children were interested under the second settlement, and interested as purchasers; yet the Court decreed against that settlement. That case, therefore, is a direct authority against the argument for protecting the infant in this case.

The only difficulty of the case is as to the plaintiffs' right to be let in before the mortgagees. But our argument proceeds on the ground not of any technical consequence of merger, but on broad principles of equity, that the mortgages have ceased to exist by the defendant's own act;—that by the mode in which he has taken the conveyance (making the legal estate subject to the uses of the settlement) he has rendered it impossible for the plaintiffs to obtain a conveyance of the legal fee, if they were to exert their right of redemption;—and that having purchased with notice of the charge, he must be considered as bound by it to the same extent as *Wills* was bound, and then having paid off the mortgage, cannot revive it as against his own incumbrancer.

However, if any prior charge is to be set up, it can only be the mortgage for 5000*l.*—for, in the state of the pleadings, it must be taken that *Wilby* the mortgagee for 3000*l.* had notice of the annuity. Purchase for valuable

valuable consideration without notice is a good plea in equity: but it must be pleaded, and cannot otherwise be taken advantage of.

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The MASTER *of the* ROLLS.

The object of this bill is to have an annuity of 180*l.* paid out of the estate of the defendant, as being the sole, or at least the preferable charge on that estate; or, if the plaintiff is not entitled to that relief, then, that she may be at liberty to redeem such incumbrances as may be considered to stand prior to the annuity.

The estate in question formerly belonged to a Mr. *Richard Witts.* The plaintiff Mrs. *Holme*, in 1805, purchased from him an annuity of 180*l.*, to be secured on this estate. It was already subject to a mortgage in fee to a Mr. *Richard Harrison* for 5000*l.*, and Mrs. *Holme* took with notice of, and subject to, that mortgage.

In 1806 Mr. *Witts* made a mortgage for 3000*l.* to a Mr. *Wilby.* Whether *Wilby* had, or had not, notice of the annuity, does not appear. There is no assertion of his having had notice, in the bill, nor any averment of want of it, in the answer. But, in my view of the case, it is not very material whether he had or had not notice of it.

In 1810, there being a sum of money in the Court of Chancery to be laid out in land on the trusts of the will of a Mr. *Lee Steere*, this estate was (under the direction of the Court) purchased from Mr. *Witts*, and conveyed to trustees on those trusts. Under that conveyance, the defendant *Lee Steere Steere* is tenant for life; and his son, the defendant *Lee Steere*, an infant, is tenant in tail in remainder.

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Mr. *Wilby* had paid off the mortgage to *Harrison*, and taken an assignment of it to himself. He joined in the conveyance to the trustees, and the legal estate thereby became vested in them. Under these circumstances, the first question is, whether the annuity be at all an incumbrance on the estate in the hands of the present owners. If it be, then in what order and priority is it to be paid? The plaintiff contends, that this estate was purchased with notice of the annuity, and, consequently, remains subject to the payment of it.

The facts, as to this part of the case, are:—That *Mark Noble Daniel*, as agent for *Witts*, negotiated the sale of this annuity; that by him it was paid, not only down to the time of the sale, but continued to be paid down to *November*, 1812; that he was also the agent employed in the purchase of this estate for the present defendants, and one of the two trustees to whom it was conveyed. It is impossible, therefore, to deny that he had complete and continued notice of the existence of the annuity. And actual notice to him, was constructive notice to those on whose account the purchase was made.

It was attempted to be made a question, whether, as infants were interested in this purchase, they could be affected with notice: but I do not see how any doubt can be entertained on the subject. It would be a strange thing to say, that by a sale to infants a man's equitable interest may be defeated, in spite of any notice he could give of the existence of his equity. There seems to be no foundation for such a doctrine.

In the case of *Le Neve* v. *Le Neve* (a), the interest of the unborn children was not attempted to be distin-

(a) 3 Atk. 646.

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guished from that of the mother. The only question was, whether she had notice or not of the prior articles; and, it being held that she was affected by her agent's knowledge of those articles, all the trusts of the second settlement, one of which was for the issue of the marriage, were postponed to those of the articles on the first marriage. Were it otherwise, a man would only have to purchase on behalf of infants, to free an estate from all equitable incumbrances to which it might be subject.

The Court of Chancery does not warrant the title of an estate which is purchased under its directions.

That this estate was purchased under the directions of the Court of Chancery, is a circumstance that cannot affect or prejudice the rights and interests of third persons. The Court of Chancery employs its officer to investigate the titles of estates, but does not warrant them.

If the annuity is to be considered as an incumbrance on this estate in the hands of the present owners, the next consideration is, in what order it is to be paid. The charges that preceded it have ceased to exist. They are all paid off and extinguished. The plaintiff contends, that the annuity is now to be considered as the sole charge affecting the estate. The defendants say, it is only to be paid in the order in which it originally stood, and that the purchasers must be considered as the owners of the antecedent charges, and entitled to retain, in the first place, so much as would be sufficient to keep down the interest of them. Supposing Mr. *Witts* himself had paid off all the other incumbrances, the annuitant would have stood in the same situation as if she had been from the beginning the sole incumbrancer. He could not have said, "I will retain for myself so much of the rents and profits as would have been required to keep down the interest of the other charges, and you must take your chance of there being enough left to pay

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you your annuity." In effect *Witts* has paid off the other incumbrances; for they have been paid out of the purchase money, and he has received so much less for his estate than he otherwise would have done. Then, what equity can the purchasers have, to consider ther as still subsisting as against any person claiming under *Witts?* They are in no worse situation than they would have been if they had bought an estate on which there was no mortgage, but which turned out to be encumbered with an annuity, not known to them in fact, but constructively known to them by means of notice to their agent. In that case, would they be permitted to say, there was a time when there was a charge upon the estate prior to the annuity, and, therefore, as between the annuitant and us, that charge shall be considered as still existing? The cases of *Greswold* v. *Marsham* (*a*), and *Mocatta* v. *Murgatroyd* (*b*), are express authorities to shew that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice. I do not see how I can make any distinction, in point of legal effect, between personal notice to the party, and notice affecting him through the medium of his agent.

I think the plaintiff is entitled to the first relief prayed by the bill, and ought not to be put to the necessity of redeeming the incumbrances, which may at one time have been prior to the annuity.

(*a*) 2 Cha. Ca. 170. (*b*) 1 P. Wms.

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July—— August 2.

FRANKLYN and SQUIRE, - PLAINTIFFS;
AND
THOMAS and DANSEY - - DEFENDANTS.

Motion for special injunction to restrain defendant (plaintiff at law) from suing out execution upon a judgment obtained by him in his action previous to the common injunction being obtained, refused, as contrary to practice, the Court only granting such special injunction in cases where the plaintiff has had no opportunity of obtaining the common injunction.

The defendant (plaintiff at law) subsequently, on the day when the common injunction might otherwise have been obtained, puts in a demurrer, which is over-ruled; and in the mean time, pending the demurrer; the plaintiff is taken in execution; after which, and immediately on the over-ruling of the demurrer, the common injunction is obtained. Upon an application to discharge the plaintiff out of custody, on the ground that, the demurrer being over-ruled, the parties are entitled to be replaced in the situation they would have been in if no demurrer had been filed, and by analogy to the case of goods taken in execution; the application being opposed on the ground that the parties would not, by granting it, be placed in the situation in which they would otherwise have stood, since the judgment had been satisfied by the taking in execution, and, if now discharged, the debt would be gone: *Ordered*, that the plaintiff be discharged on undertaking again to confess judgment, so that he might not afterwards say, the existing judgment and debt had been satisfied by the execution from which he was so discharged.

THE Bill, filed on the 9th of *May* 1817, prayed (among other things) an injunction to restrain the defendant *Dansey* from further proceeding in an action brought by him against the plaintiff *Franklyn*. *Dansey* having obtained judgment in this action before any injunction had issued, a motion was made for a special injunction, upon the ground that *Dansey* would be entitled to sue out execution before the plaintiff could obtain the common injunction. This motion was refused by the Lord Chancellor, as against the practice of the Court; according to which, special injunction, to restrain proceedings at law are granted in those circumstances only, where the party has not had any oppor-

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tunity of obtaining the common injunction; as upon judgments entered up upon warrants of attorney, &c. (*a*); although the reason why the bill was not sooner filed was stated to be, that, until the trial at law, it was apprehended there would be a good defence to the action, in which case it would have been unnecessary to resort to equity. On the 20th of *May*, (being the day on which the plaintiff would have been entitled to the common injunction,) the defendants filed demurrers to the bill, on the grounds of multifariousness, and want of parties. These demurrers were immediately set down for argument by the plaintiff; and an application was made to the Vice-Chancellor, on their behalf, that they might be advanced in his Honour's paper, or if that could not be granted, for an injunction in the mean time, until they could be disposed of. This application for an injunction was refused, but the Court appointed the earliest day for the hearing of the demurrers, that, in the then state of the business of the Court, was practicable; notwithstanding which they could not be heard before the 23rd of *June*: and on the 19th of *July*, the Vice-Chancellor pronounced judgment, overruling the demurrers.

(*a*) Thus, in a case of *Annesley* v. *Rookes*, (*August* 7, 1817,) *Merivale* moved for an injunction to restrain the defendant from suing out execution upon a warrant of attorney to confess judgment on a bond for 1200*l.* into which the plaintiff had entered, partly in consideration of the defendant returning (as so much cash) a post-obit security formerly granted by the plaintiff (who was an expectant heir) in discharge of a debt of inconsiderable amount, and upon the understanding that the principal was not to be called for till the death of the plaintiff's father. Upon affidavit of these facts, it being the vacation, and no subpœna returnable till the next term, the Lord Chancellor granted the injunction; the plaintiff undertaking to serve the defendant with immediate notice, and with liberty to the defendant to apply during the continuance of the sittings.

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The affidavit made by the solicitor for the plaintiffs, stating these facts, went on to allege that the filing of the demurrers, and the time which elapsed before they could be heard, and judgment obtained, had been exceedingly prejudicial to the plaintiffs, and particularly to the plaintiff *Franklyn*, who had been thereby deprived of the aid and assistance of the Court, which relief he believed he might have obtained, but for the demurrers, by way of injunction, either on the defendant's default in not appearing or answering, or on the merits confessed in his answer, supposing him to have been prepared to put in an answer to the plaintiff's bill in due time to prevent the common injunction.

The affidavit further stated, that the plaintiff *Franklyn* had been, subsequent to the time of filing the demurrer, and when (if no demurrer had been pending) the defendant *Dansey* would have been in contempt, taken in execution by the sheriff of *Devon*, at the suit of the defendant *Dansey*, in the action before mentioned, and had ever since remained in custody, but towards the latter end of *June* was removed by *Habeas Corpus* to the *King's Bench*, where he then was. That immediately on the Vice-Chancellor's overruling the demurrer, he (the deponent) applied for and obtained the common injunction on behalf of the plaintiff; but that such proceeding, without the special interference of the Court, would not now afford any relief to the plaintiff.

It was therefore moved, on the part of the plaintiff, that he might be discharged out of the custody of the marshal of the K. B. prison in the said action, the Vice-Chancellor having overruled the demurrers of the defendants, and having ordered the common injunction to issue.

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Leach and *Pepys*, in support of the motion, stated the principle upon which they made this application to be, that, inasmuch as the plaintiff was entitled to the common injunction on the day when the demurrers were put on the file, the defendant ought not to derive any advantage from having put in those demurrers, which were afterwards overruled. That it was obvious to what injustice such a course of proceeding would lead; for so, in all cases, a defendant might, by putting in a demurrer (however untenable) defeat the established rule of the Court; that rule being that, unless an answer is put in within eight days after the filing of the bill, the plaintiff is, at the end of that period, entitled, as of course, to the injunction to stay execution; whereas the result of this practice would be to enable the defendant, at any time before the demurrer can be disposed of, to take out execution, and thus render the injunction of no avail. That all which was now asked by the plaintiff was to be placed in the same situation as if no demurrer had been put on the file. And, though no precedent could be produced of such an interference of the Court as was now sought for in the case of a *capias ad satisfaciendum*, it was to be supported by analogy to what was the frequent practice of the Court in the case of a sheriff having taken in execution the goods of the party, which execution would not, under such circumstances, be suffered to proceed. That, if a writ of error is brought, and not allowed, it goes for nothing; although, if allowed, it has reference back to the time when it was issued; and, on the same principle, in this case, the demurrers not having been allowed, ought not to be permitted to prejudice the plaintiff, who, if the demurrer had not been put in, would at that time have been at liberty, and protected by the injunction of the Court against the effect of the judgment. And they referred

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ferred to a case of *Raphael* v. *Birdwood* (*a*) which had recently come before his Lordship.

Sir

(*a*) RAPHAEL, and Others

BIRDWOOD, and Others.

This was a bill filed by the plaintiffs on behalf of themselves and all other joint creditors of *Hart* and *Joseph* who had entered into and executed, or had acceded to, certain deeds of composition dated the 26th of *October* 1812 and 13th of *April* 1813, respectively, or either of them. The bill stated that the first of the deeds had become impracticable, and had been abandoned; and that many of the joint creditors had not come in under the second deed, nor did either of the deeds provide for, or notice, the separate creditors of either of the parties. *Hart* and *Joseph* had since become bankrupt under separate commissions. *Hart*'s assignees brought actions against the plaintiff, and the other creditors who had received payment under the composition deeds, and on some of these actions had obtained verdicts, others being entered for trial at the then ensuing *Devon* assizes. The bill, against the assignees under both commissions, prayed either that the deeds might be established, and the joint creditors, on whose behalf the bill was filed, decreed entitled to retain the sums which they had received in payment; or else, that the deeds might be set aside, and an account taken of the joint property of *Hart* and *Joseph*, and that the same might be administered under the decree of the Court, praying also an injunction, in either case, to restrain the assignees of *Hart* from proceeding on the verdicts so obtained, and in the actions so entered for trial.

To this bill the defendants (*Hart*'s assignees) had put in a demurrer. The plaintiffs set down this demurrer; and it stood in the paper accordingly, and was called on in *Trinity Term* 1817, when it stood over; and at length, (upon argument before his Honour the Vice-Chancellor,) was overruled on the 25th of

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Sir *S. Romilly*, *Bell*, and *Rose*, contrà.

No instance can be produced of such an application as the present having ever been granted. All they can allege

July, the last seal after *Trinity Term* being on the 28th.

Immediately on the demurrer having been overruled, and before the plaintiffs could move for the common injunction, an answer was put in by the defendants: the commission day at *Exeter* was on the 26th of *July*, and, from the distance of the seal, the plaintiff not being in a condition to move for the common injunction, in order to extend it to stay trial, gave special notice of motion by permission for the 26th to stay execution in the actions so commenced, and to restrain the defendants from going to trial in the other actions. This motion was founded on the affidavits of the plaintiff and his solicitor, representing that it was impossible to obtain an office copy of the answer in time to attend therewith at the trial of the causes, and that the plaintiff, and the other creditors against whom these actions were brought, could not safely go to trial without the answer of the defendants, and that he believed such answer would enable them to do so.

To this it was objected, first, that the plaintiff could not be admitted to swear as to the other creditors—but that each of them should have put in his own separate affidavit: to which it was answered, that all the creditors were under similar circumstances, and therefore one and the same defence would do for all.

Sir *S. Romilly*, *Bell*, and *Pepys*, in support of the motion, insisted, that the demurrer being overruled, the plaintiff was entitled to the common injunction, as of course; and that it was by the delay and non-attendance of the counsel for the defendants, that the argument of the demurrer had stood over.

The *Solicitor General*, *Wetherell*, and *Rose*, contrà, insisted, that this was a mere question of practice, not at all depending on the circumstances of the particular case. That the right to the common injunction

allege in the way of authority is, that certain cases have been decided upon principles which they term analogous. But the effect of such an order as is now sought to be obtained will not be such as the plaintiff himself requires; because it will not put the parties in the same situation, in which they would have stood, if the plaintiff

injunction did not arise as a matter of course upon a demurrer being put in and overruled, but could only be obtained upon motion; and the defendant not having moved, and there being no seal at which he could move, for the common injunction, and it being rendered impossible to be obtained by the diligence of the defendant, and the filing of the answer, the plaintiff was not entitled to any indulgence. This was not a demurrer merely for delay: but, if it were, there is no distinction, on a mere question of practice, between a demurrer put in for delay and any other demurrer. Then the question was, simply, whether the filing of a demurrer, by which the plaintiff is deprived of his usual remedy, entitles him, upon its being overruled, to seek an advantage which he has not according to the regular practice of the Court. No instance could be produced of such an indulgence being granted; but the case cited was an authority against it. That the defendants had a right to insist on the strict practice, unless there had been any thing in their conduct to deprive them of the benefit of it.

The *Lord Chancellor*

Said, that if the demurrer had been argued at the time when it stood in the paper, in term, the plaintiff, upon its being overruled, could have immediately put himself in possession of the common injunction, and have proceeded regularly to extend it to stay trial. The question was, then, by whose fault it was that the argument did not take place at that time—and as to this he required an affidavit.

The plaintiff thereupon produced an affidavit, that some of the counsel for the defendants being then engaged in the pending state trials, the argument of the demurrer had been postponed in consequence of their absence; and upon this the Lord Chancellor made the order.

had

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had not been taken in execution: for, by that act, the judgment was satisfied; and, if the plaintiff should now be released, he can never be taken again, and the debts are gone.

It was formerly the practice to make the sheriff himself a party after execution executed. The question now is, whether, under all the circumstances of the case, the plaintiff has any right to the extraordinary assistance of the Court; and, if he has, in what manner that assistance is to be granted.

It is difficult to say what experiments may not be tried in the way of interlocutory applications to the Court. In this case the application for an injunction, which was made on the filing of the bill, was refused with costs. A demurrer was then put in, not (as has been falsely represented) for delay, but founded on principle. This demurrer was heard in *June*, but judgment not pronounced till the 19th of *July*, when it was overruled; and, immediately upon its being overruled, the common injunction was applied for and issued. But, after execution is actually issued, the common injunction cannot operate against the sheriff so as to restrain him from proceeding under the execution; and thus, in the case of goods actually levied in execution, it is usual to make the sheriff a party in order to extend the injunction to him.

The case of *Raphael* v. *Birdwood* is very distinguishable from this. There the defendant had put in a demurrer, which was overruled at a time when the common injunction could not have been obtained, in consequence of the argument of the demurrer standing over in indulgence to the defendant's counsel.

Leach.

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The single question in this case is, Whether the demurrer did, or did not, save the injunction, which would have been obtained if a demurrer had not been put in. In answer to this question, it is said that the demurrer did not save the injunction, because execution was taken out when the defendants were entitled to take it out by the practice of the Court, as not being in contempt; and the common injunction, therefore, could not have operated to stay execution. But I believe the contrary to be true;—that the common injunction will stay the debt and costs in the hands of the sheriff, even after they have been actually levied.

The LORD CHANCELLOR.

This is an application which will require some consideration.

I am not sure that the motion, supposing it to be otherwise such as ought to be granted, is regular in its terms, or whether it should not rather have been, that *Dansey* might discharge the plaintiff; for I have certainly no authority to call upon the sheriff so to discharge him. It is true that, when goods have been taken in execution, that may be easily set right. But here the taking in execution is a discharge of the debt. It is obvious, therefore, that the motion ought not to be granted without putting the parties on terms so that, in case of my ordering the plaintiff to be discharged, he shall not take advantage of that discharge at law.

I will look into a case before Lord *Thurlow*, which I now recollect, thinking that it will prove to be an authority on this very point; and will mention it again to-morrow.

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Where an injunction is obtained, even after execution executed, it is a breach of the injunction to call on the sheriff to pay over the money; but if the sheriff had voluntarily paid the money, it seems that would be no breach of the injunction. *Sed quære.*

The LORD CHANCELLOR.

The case which I referred to yesterday does not, as I apprehended it would, decide the present question. That was a case in which Lord *Thurlow* held that, where an injunction is obtained, even after execution executed, it is a breach of that injunction to call upon the sheriff to pay over the money; but he at the same time thought that if the sheriff had voluntarily paid the money, it would have been no breach of the injunction. Now it is difficult to say how the act of the sheriff can vary the right of the parties; and I should think that, in such a case, the person receiving the money would be ordered to pay it into Court.

The same principle must have operated, (though I can find no case expressly to the purpose,) where the execution is against the body. But then great care must be taken to make him as liable as if he had been kept in execution for the debt. The difficulty therefore is, to frame such an order as will obviate the effect of the discharge upon the debt.

August 2.

The LORD CHANCELLOR.

Upon the fullest search, I cannot find that any thing is established with regard to the practice in such a case as this; and it is therefore incumbent on the Court to settle the practice in the best way it can according to principle.

Where a demurrer has been overruled, the injunction follows of course.

If an injunction is obtained on bill filed after execution executed, the goods not yet being out of the hands of the sheriff, and the sheriff proceeds to sell without process, he will be ordered to pay the money into Court.

If an injunction is obtained upon the bill being filed, after execution executed, and, at the time of the injunction being obtained, the goods are not yet out of the

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hands of the sheriff; then, if the sheriff proceeds to sell without process, he will be ordered to pay the money into Court.

Formerly the practice in such a case to make the sheriff a party, but since disused.

It was formerly the practice in such a case to make the sheriff a party by supplemental bill, if the money has come into his hands since the injunction issued; or by the original bill, if the money was in his hands at the time. But we are now got into a much looser practice.

The principle is this:—While it is in contemplation whether a good case can be made or not, if it turns out that there is an equitable case in the result of the demurrer, then to deal with it as an equitable case from the first, and prevent execution.

If, where the plaintiff is entitled to an answer, and the defendant thinks fit to file a demurrer, the Court thinks that demurrer untenable, and the equity of the plaintiff is therefore sustained, it is the bounden duty of the Court to interfere for the protection of the plaintiff's body.

It must of necessity be, that the Court has the power; and, if so, it follows that it is also the duty of the Court to place the defendant where he would have been but for an untenable defence.

The order therefore to be made in this case should be, that he shall be discharged on undertaking again to confess judgment, so that he may not afterwards say, the existing judgment and debt has been satisfied by the execution from which he is now discharged.

The following order was made:—

"That the defendant *Dansey* do discharge the plaintiff *Franklyn* out of the custody of the marshal of the

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the *King's Bench* in the action at the suit of *Dansey*, upon the plaintiff's delivering to the defendant a warrant of attorney to confess judgment in the Court of King's Bench in the same sum for which he is at present in execution, together with interest subsequently accrued, sheriff's poundage, and other incidental expenses, as of the same term as the former judgment; and also upon his undertaking not in any manner to avail himself of his having been taken in execution as a discharge of the debt, and submitting to an immediate order for payment of the money into Court, in case the injunction should be dissolved, and, in default of such payment, surrendering himself to the Warden of the *Fleet* and consenting to waive personal service of the order, and also consenting that an attachment shall immediately go against him for his contempt, without any previous writ of execution.—With liberty to *Dansey* to apply to the Court, with or without notice, in case of any breach, or non-compliance with the terms of the order."

[Reg. Lib. A. 1816. fo. 1378.]

ROBERT BLORE, - - - - PLAINTIFF; Rolls. 1816.
AND
Sir RICHARD SUTTON, Bart., JAMES WEST, H. C. LITCHFIELD, Dame MARY IMPEY, and CHRISTOPHER CODRINGTON, - - - - - - - - - - DEFENDANTS.

June 18, 20, 1817. August 25.

A. tenant for life with a power to lease by deed duly executed under her hand and seal, reserving the best yearly rent. Plaintiff enters into possession, and expends money in building under an agreement for a lease evidenced only by the memorandum in writing entered in the book of *A.*'s authorised agent, signed not by the agent himself, but by his clerk, although in evidence to have been approved by him, and according to the usual course of business.

A. dies; and on a bill for specific performance against the remainder-man, *held*, first, no sufficient agreement in writing—not being signed by an agent properly authorised, and, if it had, yet the memorandum not containing some of the material terms of a lease, which were left to be made out by parol evidence; secondly, not to be established as a parol agreement in part performed—both as it was not the agreement of the principal, nor of the authorised agent, and also because the remainder-man has been guilty of no fraud upon which to charge him with the conveyances of the contract. Also, the plaintiff not entitled to compensation from *A.*'s representatives for money laid out by him on the faith of the alleged agreement—such compensation being in the nature of damages, and the fault lying in the plaintiff's own negligence.

THE bill stated that *Henrietta Laura*, late Countess of *Bath*, was tenant for life, under the will of her mother, of certain messuages &c. in the parishes of *St. James, Westminster*, and elsewhere, with a power (contained in the will) "from time to time, and at all times "after she should have attained twenty-one, during "her life, whether covert or sole, by deed duly exe-"cuted under her hand and seal, to demise or lease "unto any person or persons, &c. for any term of years "not exceeding ninety-nine years from the time of "executing such lease, so as to take effect, either in "possession, or immediately after the determination of "the leases then subsisting, and so as upon every such

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"lease there should be reserved, to be due and pay-"able during the continuance of the estates to be "thereby granted, the best and most beneficial yearly "rent or rents, to be incident to the immediate rever-"sion, that, considering the nature of the case, could "be reasonably had or gotten for the same at the time "of making such lease, without fine, premium, or fore-"gift, and half-yearly payable, and so as in all such "leases there should be contained a covenant obliging "the respective lessees to insure the premises, and con-"ditions of re-entry in case the rent should be in arrear, "and so as the respective lessees should severally seal "and deliver the counterparts of their respective leases, "and enter into covenants to repair, and other usual "covenants."

On the 26th of *October* 1807, the plaintiff entered into a contract with *S. P. Cockerell*, "as the agent for and on behalf of the said Lady *Bath*," whereby, in consideration of the money to be expended by the plaintiff in building, *Cockerell*, "as such agent as aforesaid," agreed to let to him certain premises in *Piccadilly* (part of the estate comprised in the will;) and a memorandum of such contract, and of the terms thereof, was then made in writing, and entered in a book kept by *Cockerell*, as follows:—"Plans of the ground and buildings agreed to be built by Mr. *Robert Blore* in *Piccadilly*, where Mr. *Arnold*'s house now stands—the term to be ninety-nine years, and the rent for the first two years 60*l.* per annum: and for the remainder of the term 120*l.* per annum:—Covenants as usual in the *Bath* estate." The memorandum so made and entered was signed by the plaintiff.

Lady *Bath* died in *July* 1808, having by her will appointed the defendant *Codrington* (together with others,

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others, of whom *Codrington* survived,) her executor. The defendant Sir *Richard Sutton* (an infant) was, at the death of Lady *Bath*, become entitled to the estates of which Lady *Bath* had been tenant for life, as tenant in tail by virtue of the will of his grandfather Sir *Richard Sutton*, the remainder-man (*a*); and the other defendants were the representatives of Sir *Elijah Impey*, the surviving trustee under that will.

The bill stating further that, in part performance of the agreement with Lady *Bath*'s agent, the plaintiff had taken possession of the premises, and laid out 6000*l*. in buildings upon the same, prayed a declaration that Sir *Richard Sutton* was bound by the agreement, and that he, and all other necessary parties, might be directed to grant to the plaintiff a lease of the premises upon the terms and conditions of the agreement; the plaintiff offering to execute a counterpart of such lease; or, if the Court should be of opinion that Sir *Richard Sutton* was not bound by the agreement, then an account of monies expended in repairs or otherwise, and that the plaintiff might be declared entitled to be reimbursed the amount thereof out of the personal estate of Lady *Bath*.

The evidence of *Cockerell*, the agent employed by Lady *Bath* for receiving the rents and for the management and letting of her estates in *London*, stated that the business of so managing and letting the estates

(*a*) It did not appear in the pleadings by what title Sir *Richard Sutton* claimed as remainder-man: but it appears from the report of *Lady Cavan* v. *Pultney*, 2 Ves. J. 544. and was therefore asumed by the plaintiff's counsel, and not resisted on behalf of the defendant, that the remainder was created by the will of Lady *Bath*'s mother — the same instrument which contained the leasing power.

See also the next case of *Sutton* v. *Lord Chetwynd*.

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in question was conducted in his office, and either personally by himself, or by the occasional assistance of *Noble* (his chief clerk,) or some other clerk, under his immediate direction. That, about the time stated in the bill, *Noble*, with the privity and under the immediate direction of the witness, as such agent, for and on behalf of Lady *Bath*, verbally agreed with the plaintiff to make to him a building lease of the premises in question for ninety-nine years on the terms above specified. That the particulars of the agreement were not reduced into writing, otherwise than by a memorandum (the same with that stated in the bill) being made thereof by *Noble*, by the witness's order, upon a plan drawn and signed and affixed by the plaintiff as a description of the buildings which the plaintiff proposed to erect upon the scite of the premises. That *Noble* affixed his initials to such entry or memorandum; and that the lease so agreed to be granted was to commence at the expiration of a then existing lease, which expired at *Christmas* following the date of the memorandum. He deposed further that, at the time of the agreement being entered into, the premises in question stood in need of very heavy and substantial repairs, and that it appeared to the witness that it was better they should be pulled down and other buildings erected on their scite than that any repairs should be attempted. That the plaintiff had, since the date of the agreement, laid out very considerable sums in rebuilding the same pursuant to the agreement; but that the same were only in part rebuilt at Lady *Bath*'s death, and only one fourth part of the whole cost at that time expended therein; and witness believed that, if the plaintiff had then stopped proceeding with the buildings, the same could not, in their then unfinished state, have been let for much more than the yearly rents of 60*l.* and 120*l.* reserved by the agreement,

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ment, and that all the benefit of the improvements had accrued since Sir *Richard Sutton* succeeded to the inheritance.

The evidence of *Noble* was principally to the same effect. That of other witnesses examined on the part of the plaintiff went to the condition and value of the premises, and the money expended by him under the agreement.

Hart and *Courtenay*, for the plaintiff.

First, this is a sufficient contract in writing, signed by an agent duly authorised—although not by *Cockerell* himself, yet by his chief clerk, under his immediate direction, and according to the usual course of business in his office. If so, it is equally binding on the remainder-man as a lease actually executed in conformity to the power. *Shannon* v. *Bradstreet* (*a*). There is no general rule by which it can be determined what constitutes agency: but in this case it is sufficiently to be inferred from the circumstances the magnitude of the property —the course of management -and the habit of the office.

Secondly, if this is not a sufficient agreement in writing, then it is a parol agreement, which has been part performed, and would therefore be binding on the party and those deriving under him. The principle upon which *Shannon* v. *Bradstreet* was decided will apply to this case also; and, if it were to be held otherwise, it would be opening the door to fraud and great inconvenience.

There is no principle, according to w' ich a Court of equity has been induced to supply the defective

(*a*) 1 Scho. and Lef. 52.

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execution of a power, which does not apply to a case like the present.

Sir *S. Romilly*, and *Richards*, for the defendant Sir *Richard Sutton*.

The cases in which equity supplies the defective execution of powers, are confined to those of defects in point of form. Here the defect is in substance. The power does not authorize leases upon such terms as those of the agreement in question, by which two different rents are reserved, neither of them the best that could be obtained; and this alone disposes of the case.

In the next place, there is no agreement in writing. *Noble*'s agency is not proved. He is the clerk of Mr. *Cockerell*, not the agent of Lady *Bath*; and there can be no delegation of agency.

Lastly, as to part performance, that is not insisted on by the bill, as a ground for the relief prayed.

Shannon v. *Bradstreet* has carried the doctrine of equity to an inconvenient length, and it seems at least doubtful whether this Court would go so far as to recognize its authority. It is not however necessary now to impeach it. It is enough to insist that the principle ought not to be extended further. Here is an express power, annexing to its valid execution the necessity of an instrument under seal, and a counterpart; and in the absence of every requisite, the Court is now called upon to declare that an agreement so imperfectly made is tantamount to the execution of the power so as to bind the remainder-man. In the case cited, Lord *Redesdale* himself expresses

presses a doubt whether, if it had been the case of a parol agreement in part performed, it could have been enforced against the remainder-man, observing that the party himself is held to be bound by a part performance principally on the ground of fraud, which is personal. But the remainder-man has been guilty of no fraud. Why is he to be subjected to the inconvenience of having this agreement forced upon him in direct violation of the statute?

Bell and *Dowdeswell*, for the defendant *Codrington*.

If this be a sufficient agreement within the statute, then it is binding on the remainder-man. But it is not such an agreement.

Supposing, however, that there were a valid agreement, and that the Court should hold that the remainder-man is not bound by it, still this is no case for compensation, but the plaintiff must be left to his action for damages. *Denton* v. *Stewart* (a), if to be supported at all, is no authority for the present case: but there the defendant had it in his power to perform the agreement; and, while the suit was pending, put it out of his power to do so by his own act. And in *Todd* v. *Gee* (b) Lord *Eldon* says, that the case of *Denton* v. *Stewart*, if not to be supported on that distinction, is not according to the principles of the Court.

Hart, in reply.

The case is very peculiar, and must be considered in all its bearings. There can be no doubt that

(a) 1 Cox. 258. cited 1 Ves. j. 329. and 17 Ves. 276. *Greenway* v. *Adams*, 12 Ves. 395.

(b) 17 Ves 273. *Gwillim* v. *Stone*, 14 Ves. 128. Sugd. Vend. & Purch. 188, 9.

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there is a contract signed by an agent properly authorised; for the act of *Noble* under *Cockerell's* immediate direction is the act of *Cockerell* himself. There is no fact in dispute—no conflict of evidence—no imputation on the *bona fides* of the transaction. The contract is a beneficial contract, and equally for the advantage of all parties.

As to the power, this is not a mere ordinary leasing power, and must be regarded with reference to the quality of the property and the nature of the case. There is nothing to exclude a lease for the purpose of building, or to prevent a variation in the rent according to the actual value; and it is in evidence that these rents were fixed by a *bonâ fide* estimate made by persons of competent judgment.

Admitting the principle, that *delegatus non potest delegare*, this is a case to be determined by the usual course of management—a course of management pursued for a series of years, and recognized by the owners of the property, who must be taken to have adopted the acts of those to whom the principal agent has confided a part of that management as the acts of the agent himself. *Noble* was the servant, not the delegated agent, of *Cockerell*; and *qui facit per alterum, facit per se*. As to the agent by his signature binding the principal, see *Kemys* v. *Proctor* (*a*), *White* v. *Proctor* (*b*), &c. Mr. *Sugden*, in his Treatise on Powers (*c*), mentions an opinion given by Lord *Kenyon*, that ever since the case of *Leach* v. *Campbell* (*d*), a lease by parol from year to year by a tenant for life with a power, is binding in equity upon

(*a*) 3 Ves. & B. 57.

(*b*) 4 Taunt. 209. See Sugd. Vend. & Purch. 81.

(*c*) 2d Ed. p. 358.

(*d*) Ambl. 740. Appx. to Sugden on Powers, No. 13.

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upon the remainder-man. As to the doubt expressed by Lord *Redesdale* in *Shannon* v. *Bradstreet*, the only difference between a written and parol agreement is on the ground of the latter opening a door to fraud; and, where the agreement is evidenced by acts of part performance, it amounts in principle to the same thing.

With respect to the alternative prayed by the bill, your Honour, in *Greenway* v. *Adams*, thought there was nothing unreasonable in the decision of *Denton* v. *Stewart*. We admit that this is not a Court that can award damages: but, if we have been led by the act of Lady *Bath*'s agents to expend money on the faith of an undertaking which they are unable to execute, it is reasonable that we should call upon her representatives to repay us the money we have laid out; and this Court will decree an account to be taken accordingly.

The MASTER *of the* ROLLS.

This is a bill for the specific performance of an agreement to grant a lease. The agreement is alleged to have been entered into with the agent of the late Countess of *Bath*, who was tenant for life, with a power of granting leases in the manner and on the terms specified in the power; and the question is, whether there be any such agreement in this case as is binding upon the remainder-man, the defendant, Sir *Richard Sutton*.

It appears to me that there is no sufficient agreement in writing; first, because *Charles Noble*, who signs his initials to the memorandum written on the plan, is neither alleged by the bill, nor proved by the evidence, to have been the authorised agent of Lady *Bath*; secondly,

because

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because the memorandum does not contain some of the material terms of a building lease, which this was. It merely specifies the rent, and the number of years. It does not even specify the commencement of the lease. By the parol evidence, indeed, it is said, that it was to be from the expiration of a subsisting lease. But then the whole agreement is not in writing.

It was insisted, however, that there is a parol agreement, in part executed; for the plaintiff has expended large sums in building upon the premises, partly in Lady *Bath*'s lifetime, but principally since her death. The agreement, it is said, is therefore binding on the remainder-man. It is rather difficult to say, that there is even a parol agreement by an authorised agent of Lady *Bath*. For the evidence is, that *Noble*, by the direction and with the privity of Mr. *Cockerell*, who was Lady *Bath*'s agent, did make a verbal agreement with the plaintiff. This seems rather a delegation of *Cockerell*'s authority, than the personal exercise of it. He does not appear to have had any communication with the plaintiff. He does not say, I ratify the terms agreed upon by *Noble*; but, I authorise *Noble* to make the agreement. Supposing, however, that, by the effect of *Cockerell*'s direction to *Noble*, this can be construed to be the parol agreement of *Cockerell* himself, and that, subsequently to such agreement, and on the faith of it, an expenditure has been made by the plaintiff, there is no authority for holding that the remainder-man is bound by such an agreement.

It is considered as a fraud in a party permitting an expenditure on the faith of his parol agreement, to attempt to take advantage of its not being in writing. But of what fraud is a remainder-man guilty, who has entered into no agreement, written or parol, and has done no act, on the faith of which the other party could

have

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have relied? The only way in which he could be affected with fraud, would be by shewing, that an expenditure had been permitted by him, with a knowledge that the party had only a parol agreement from the tenant for life. Without that knowledge, there is nothing in the mere circumstance of expenditure. For the *primâ facie* presumption is, that he who is making it has a valid lease under the power, or at least a binding agreement for a lease. That the remainder-man in this case, or those acting on his behalf, had any such knowledge, is neither alleged, nor proved. The reason, therefore, fails, on which the case of a parol agreement, in part performed, is taken out of the statute of frauds.

On the strict construction of the power, the remainder-man would only be bound by a lease executed conformably to it. But Lord *Redesdale* has, I think, in the case of *Shannon* v. *Bradstreet* (*a*), given satisfactory reasons, why a clear, explicit, written agreement ought, in equity, to be held equivalent to a lease, and as binding on the remainder-man as a formal lease conceived in the same terms would have been. But, to go farther, and say, that a man shall be bound not by his own parol agreement, but by the uncommunicated and unknown parol agreement of another person, would be to break in upon the statute of frauds, without the existence of any of the pretexts on which it has been already too much infringed.

On the supposition that the plaintiff cannot obtain specific performance, he prays that he may be reimbursed for his expenditure out of Lady *Bath*'s assets. This would be, as against her representatives, a decree merely for damages, and not a compensation for the benefit her estate has received. It is the estate of the

(*a*) 1 Sch. & Lef. 52.

remainder-man

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remainder-man that is benefited by the houses built upon it. The competency of a Court of Equity to give damages for the non-performance of an agreement has, notwithstanding the case of *Denton* v. *Stewart* (a), been questioned by very high authorities. In that case, however, the party was guilty of a fraud, in voluntarily disabling himself to perform his agreement, and had an immediate benefit from the breach of it. But Lady *Bath* never refused to perform the agreement. On the contrary, the plaintiff alleges, that, if she had lived, she would have granted him a lease. Then the case is only that he himself has been so improvident as not to get from Lady *Bath* that which, he says, she would have given him; namely, a lease that would have been binding on the remainder-man. That, surely, is not a case in which a court of equity will exercise a doubtful jurisdiction, by awarding damages for a loss, which, if it shall ever be sustained, will have been occasioned, more by the plaintiff's negligence, than by Lady *Bath*'s fault. I say, if it shall be ever sustained; for it does not appear that the plaintiff has been yet evicted; and I cannot believe that Sir *Richard Sutton*, when able to judge and act for himself, will think of taking the benefit of the plaintiff's improvements, without making him a compensation for them. But, be that as it may, I should not be warranted in straining general principles in order to obviate the hardship of a particular case.

The bill must be dismissed, but without costs.

(a) 1 Cox. 258. and see before, p. 243.

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Sir RICHARD SUTTON, Baronet, (an Infant, by his next friend,) - - - PLAINTIFF;

AND

Lord Viscount CHETWYND, OSBORN MARKHAM, the Earl of DARLINGTON, and JOHN PADDY, - - - - DEFENDANTS.

ROLLS. 1812. Trin. Term, 1817. *Aug.* 25.

Covenant in marriage articles in favour of a stranger held merely voluntary, and not to be supported by the marriage consideration.

FRANCES, the wife of Sir *William Pulteney*, Baronet, by her will made in execution of a power reserved to her in her marriage settlement, devised or appointed certain estates therein mentioned, to the use of her daughter *Henrietta Laura Pulteney* (afterwards Countess of *Bath*) for life, with remainder to her first and other sons in tail male, with several remainders over, and with an ultimate remainder, in default of such issue as therein mentioned, to the use of Sir *Richard Sutton*, the grandfather of the plaintiff; and died, leaving the said *Henrietta Laura Pulteney*, (then an infant) her only child.

Henrietta Laura Pulteney (while still an infant) became entitled, to her and her heirs, according to the custom, to certain copyhold premises holden of the manor of *Stoke Newington*; and being so entitled, she was, on the 20th of *September* 1784, admitted tenant, and on the 8th of *August* 1789, surrendered the premises "to such use or uses, and for such estate and estates, as she should by her last will declare, limit, and appoint the same."

By articles of settlement dated the 23d of *July* 1794, previous to the marriage of the said *Henrietta Laura Pulteney* (then Countess of *Bath*) with Sir *James Pulteney*, Bart. and made between the said Sir *James Pulteney* of the first part, the said Countess of *Bath* of the second

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cond part, Sir *W. Pulteney* (father of the Countess) of the third part, and the defendants Lord *Chetwynd* and *Markham* and another (trustees) of the fourth part; reciting that the Countess was entitled (among other things) to the said copyhold premises, and that Sir *James Pulteney* thereby consented to enter into an agreement that all the real and personal estate of Lady *Bath* (except as therein excepted) should (previous to the marriage) be conveyed to the said trustees and their heirs, executors, &c. upon the trusts therein mentioned, and so that, for the purpose of making a provision for younger children of the marriage, the several estates therein specified (including the copyholds) should be made an accumulating fund for the benefit of younger children, in the manner and upon and subject to the terms and conditions after mentioned, it was witnessed that, in pursuance of the said agreement, it was thereby declared and agreed, and the said Lady *Bath*, with the consent of the said Sir *J. Pulteney*, did thereby for herself, her heirs, &c., covenant and agree to and with the said trustees, their heirs, &c. that, in case the marriage should take effect, she, and all persons claiming any interest in trust for her in the several estates to which she was entitled as therein mentioned, (except as therein mentioned), should, within six months after the solemnization of the marriage, do all such acts as should be necessary for granting to and vesting in the said trustees and their heirs all the estates (including the copyholds), and that the same might (as to part, after the decease of Sir *W. Pulteney* her father, and as to the remainder, after her own death) be made an accumulating fund for the benefit of such younger children as therein mentioned; and, subject thereto, in trust to make such conveyances and assurances thereof to and for the benefit of such person or persons, and for such estate and estates, and subject to such powers and conditions, as she (the

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said Lady *Bath*) should in manner therein mentioned direct or appoint; and, in default of appointment, to stand seized thereof during the coverture for the sole and separate use of Lady *Bath*, and after her death, as to so much and such parts as were by the said will of *Frances Pulteney* (her mother) devised or appointed, or intended so to be, in trust for such person or persons, and for such estate and estates, &c., as by the said will of *Frances Pulteney* was expressed concerning the same; and as to the remainder (including the copyholds) in trust for such person or persons, and for such estate and estates, &c. as by the said will of *Frances Pulteney* expressed concerning the said former estates, or as near thereto as the deaths of parties, and other contingencies, would admit.

Sir *Richard Sutton* (the devisee of *Frances Pulteney*) died in the lifetime of Lady *Bath*, leaving the plaintiff his grandson and heir at law; and Lady *Bath* died in *July* 1808 without issue, and having made her will, but not having thereby or otherwise made or executed any further appointment of the copyholds.

The bill, alleging that, upon the death of Lady *Bath*, the plaintiff became entitled in equity under the marriage articles to the copyhold premises, the legal estate in which had descended to the defendants the Earl of *Darlington* and *John Paddy*, who had procured themselves to be admitted tenants thereto, prayed that the articles might be decreed to be specifically performed and carried into execution, and that the defendants the Earl of *Darlington* and *Paddy* might be directed to surrender the copyholds, in order that the defendants Lord *Chetwynd* and *Markham* might be admitted tenants upon the trusts of the articles, or that the same might be surrendered to the plaintiff and his heirs, and pos-

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session thereof delivered to him, and an account of rents and profits, &c.

The defendants, the Earl of *Darlington* and *Paddy*, by their answer alleged that neither the plaintiff nor his grandfather was a party to Lady *Bath*'s marriage articles, and that the plaintiff ought to be considered in equity as altogether a stranger to the same and not entitled in consideration of blood or otherwise to have the same specifically performed for his benefit by divesting the defendants of their legal estate and possession.

The principal question was, Whether the consideration of marriage could be held to extend, under the covenant in the articles to all the provisions of the will of *Frances Pulteney*, or whether that covenant was merely voluntary as to Sir *Richard Sutton* and his descendants, who were strangers to the settlement.

The following cases were cited in the argument. *Jenkins* v. *Keymis* (*a*), *White* v. *Stringer* (*b*), *Osgood* v. *Strode* (*c*), *Stephens* v. *Trueman* (*d*), &c.; and see *Sugden*'s Vendors and Purchasers, chap. 16. sect. 1. (4th Ed. p. 535. et seq.) *Clayton* v. *Wilton* (*e*), *Fairfield* v. *Birch* (*f*), &c.

Leach and *Dowdeswell*, for the plaintiff.

Sir S. *Romilly*, *Fonblanque*, and *Horne*, for the defendants Lord *Darlington* and *Paddy*.

[I was not present when the case was argued.]

(*a*) 1 Lev. 150. 237. 1 Cha. Ca. 105.

(*b*) 2 Lev. 105.

(*c*) 2 P. W. 245.

(*d*) 1 Ves. 73.

(*e*) Cited in Sugd. p. 537.

(*f*) Ib. p. 539.

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This is a bill for the specific performance of a covenant contained in the articles of agreement made on the marriage of the late Sir *James Pulteney* and the Countess of *Bath*. And the question is, whether the covenant is to be considered as merely voluntary, and therefore not to be carried into execution in a court of equity, or whether the consideration of marriage does not extend to all the limitations and agreements contained in the articles.

By the articles, in this case, it was agreed that, in events that have happened, the copyhold estate in question should go according to the limitations of the will of Lady *Bath*'s mother. Under that will, Sir *Richard Sutton*, the plaintiff's grandfather, was the ultimate remainder-man in fee. Sir *Richard* was no party to the articles, nor is he mentioned in them. Of course, no consideration whatever moved from him; nor does it appear that he was related in blood to any party from whom any consideration did move, or indeed to any of the parties to the marriage articles.

It seems, therefore, that nothing short of the establishment of the broad general proposition attributed to Lord Chief Justice *Hale* in *Jenkins* v. *Keymis* (*a*) could support his claim.

When this cause was heard, it was stated that there was a case depending in the Court of King's Bench, upon a reference from the Court of Chancery, in which the general question might possibly be decided. It afterwards appeared, however, that the case alluded to turned upon its own particular circumstances, and would

(*a*) 1 Lev. 150, 237. 1 Cha. Ca. 105.

be

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be no precedent for the decision of the question before me. In the mean time the case of *Johnson* v. *Legard* had occurred here, in which the question was, whether limitations in a marriage settlement to the brothers of the settlor were good against a subsequent purchaser for a valuable consideration. That case being sent to law, my judgment was again suspended; for, although a decision in favour of the brothers would not necessarily be an authority for the plaintiff's claim, a decision the other way would be a direct authority against it. The case has been lately decided, and the Court of King's Bench have certified that the limitations to the brothers were void against the purchasers. This decision expressly negatives the proposition, that every limitation in a settlement is protected and rendered valuable by the consideration of marriage. And, to that extent, I entirely concur in the opinion given. I say, to that extent; because the negative of the general proposition is sufficient for the decision of the present cause, and I do not wish to prejudice any other question that may be made when the certificate comes before the Court for confirmation (*a*).

(*a*) The case of *Johnson* v. *Legard* is not yet reported. On the 16th and 17th of *July* 1818 it came before the Vice-Chancellor for further directions upon the certificate, when His Honour was pleased to confirm the same. The case of *Smith* v. *Garland* (ante, Vol. II. p. 123), was cited in argument, but held not to govern the question in *Johnson* v. *Legard*, the bill, in the latter case, being filed by creditors, and by the person claiming under the voluntary settlement, not by the settlor, as in *Smith* v. *Garland*. In both cases the defendant (who was the purchaser) raised by his answer the objection to the title founded on the voluntary settlement, but submitted to perform the agreement if the Court should be of opinion that a good title could be made.

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There are, certainly, cases in which a Court of Equity has executed covenants in marriage settlements in favour of collateral relations (*a*): but I am not aware of any, in which it has been laid down, that a covenant in favour of a stranger is to be carried into execution, merely because it is found in a marriage settlement. For aught that appears in this cause, Sir *Richard Sutton* must be taken to be a mere stranger; and, therefore, the bill must be dismissed, with costs as to the trustees, without costs as to the heir at law.

(*a*) See *Pulvertoft* v. *Pulvertoft*, 18 Ves. 92, and cases cited.

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ROLLS. 1816. *Nov.* 18. 1817. *Aug.* 11.

W. H. WORRALL, and ANN WORRALL, Infants, - - - - - - PLAINTIFFS;

AND

A. JACOB (Assignee of GRAHAM WILKINSON, Bankrupt), ANN WORRALL, Widow, and Others, DEFENDANTS.

By deed of separation the husband (a trader liable to the bankrupt laws) covenants with a trustee for the wife, in consideration of being indemnified from all debts and engagements which might be contracted by her during the separation, to release his remainder in fee in certain estates, (of which he was tenant for life, with remainder to the wife for life, with remainder to the issue of the marriage, with remainder to himself in fee,) to such uses, &c. as the wife shall by deed or will appoint; with power to the wife to revoke the uses of such deed or will.

The wife executes the power by deed, which she retains in her possession, and afterwards alters, and re-executes.

Held, *first*, that the covenant, although entered into on occasion of a separation between husband and wife, was yet binding in equity, being made to a third party; *secondly*, that it might be supported against creditors, under the statute of *James*, by the consideration of indemnity against the wife's debts and engagements; *thirdly*, that, the deed of appointment containing no power of revocation, although it was contained in the instrument creating the original power, the re-execution was void, and the original appointment therefore was decreed to be carried into execution.

BY settlement made after the marriage of *Graham Wilkinson* (a trader liable to the bankrupt laws) and *Mary* his wife, in consideration thereof, *Wilkinson* and his wife conveyed an estate (to which she was entitled as tenant in tail under the will of her father) in order that a recovery might be suffered (which was suffered accordingly) to the use of the husband for life, remainder to trustees to preserve, &c., remainder to the wife for life, remainder to the children of the marriage, as the husband and wife jointly, by deed, or (in default of joint appointment) as the survivor should, by deed with or without power of revocation, or by will, appoint,

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point, and, in default of appointment, to the use of the first and other sons of the marriage in succession, in tail, remainder to all and every the daughters of the marriage equally as tenants in common in tail, and in default of such issue, to the use of the survivor of them (the said *G. Wilkinson* and his wife), his or her assigns for ever.

A separation afterwards took place between *Wilkinson* and his wife; and by indenture entered into on the occasion of that separation, and made between the said *Graham Wilkinson* and *Mary* his wife of the one part, and *William Worrall* (who was brother to Mrs. *Wilkinson*, and father of the infant plaintiffs) of the other part, reciting the settlement, and that in consideration thereof *Wilkinson* had agreed to enter into covenants for payment to his said wife of an annuity of 70*l.* for her sole and separate use during such separation, and for releasing to her, or such persons as she should appoint, the remainder or remainders in fee to which he might be entitled under the settlement in default of issue, and that *Worrall* had agreed to save harmless and indemnified the said *Wilkinson*, his executors, &c. from all debts and engagements, that his wife might contract during the separation, *Wilkinson* covenanted with *Worrall*, accordingly, that, in case he should survive his wife, and there should be no issue of the marriage at her death, he would, immediately on her death, "release and assure unto trustees, or otherwise," all his remainder in fee, after his own decease, in the said estate, "to the use of "such persons, and for such estate, &c., and upon such "trusts, &c., with or without power of revocation and "new appointment, as his said wife should, notwith- "standing her coverture, by any deed under her hand "and seal (executed as therein mentioned) or by will "(which deed or will she was thereby fully authorised "to make, alter, or revoke,) notwithstanding her co-

 "verture

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"verture appoint;" and, in default of appointment, to the use of her right heirs for ever (*a*).

By deed poll, dated the 25th of *April*, 1797, duly executed according to the power, *Mary Wilkinson* appointed that, in case of her death, living her husband, he (the said *G. Wilkinson*,) should, immediately after her decease, convey the said remainder in fee to the use of the said *W. H. Worrall* for life, and after his decease to the use of his children as tenants in common.

Afterwards, on the 28th of the same month, the deed was resealed and redelivered by *Mary Wilkinson* in the presence of the same persons who were witnesses to the first sealing and delivery thereof; an interlineation having been first introduced, after the estate for life to *W. H. Worrall*, "to the use of *Ann Worrall* his wife for her life, and after the several deceases of the said *W. H. Worrall* and *Ann* his wife," to the children as before.

Mary Wilkinson died in *September*, 1799, without having had any issue, leaving her husband, and the said *W. H. Worrall*, surviving.

In *February*, 1805, a commission of bankrupt issued against *Wilkinson*, under which the defendant, *Jacob*, was chosen assignee.

Graham Wilkinson (the bankrupt) died in *May*, 1807, without having ever made, and without having been called upon to make, a conveyance of the estate according to his covenant.

(*a*) This deed is not sufficiently set forth in the pleadings: but the true nature of its provisions may be collected from His Honour's judgment, founded either on inspection of the deed itself, or on the admission of parties at the hearing.

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Worrall also died, leaving the plaintiffs his children, and the defendant *Ann Worrall* his widow, surviving.

The bill filed by the children of Mr. and Mrs. *Worrall* insisted that the re-execution of the deed of appointment by Mrs. *Wilkinson* did not alter the legal effect of the deed, for that, after it was executed, she had no power to revoke, or appoint to any new uses; and it prayed (as against the assignee) a conveyance of the estate, pursuant to the covenant of the deed of separation and the appointment; and an account of the rents and profits.

Sir *S. Romilly* and *Heald*, for the plaintiffs.
Bell, for the defendant Mrs. *Worrall*.
Agar and *Pepys*, for the assignees.
Wetherell, for another party in the same interest.

Three questions were raised; first, upon the deed of separation, whether a court of equity would carry into execution the covenant which it contained, being a covenant arising out of, and founded upon, that transaction; as to which were cited *Lord St. John* v. *Lady St. John* (a), *Legard* v. *Johnson* (b), *Lord Rodney* v. *Chambers*. (c)

The second question was, whether the covenant, if otherwise to be supported, was not void as against creditors, being unsupported by any valuable consideration, and Mr. *Wilkinson* having been (as appeared from the evidence) a trader at the time of entering into it. And, as to this, it was said that the case came within the statute of *James* (d). But it was answered, that the covenant from the trustee to indemnify the husband against the

(a) 11 Ves. 526.
(b) 3 Ves. 352.
(c) 2 East 283. And see other cases cited in *Lord* v. *Lady St. John*.
(d) 1 Jac. 1. c. 15. § 5.

 debts

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debts of the wife was in itself a sufficient valuable consideration to support the transaction; and *Stephens* v. *Olive* (a) was principally relied upon in support of that proposition.

The third point was as to the claim of the widow Mrs. *Worrall* to an estate for life under the deed of appointment, as it had been re-executed and redelivered by Mrs. *Wilkinson*, no power of revocation having been reserved in the instrument of appointment, although contained in the original power. *Hele* v. *Bond* (b). But in answer to this it was observed that the deed was voluntary on the part of Mrs. *Wilkinson*, and, after its first execution, had been retained by her in her own custody; and it was said that, where the possession of such a deed has not been parted with, it still remains in the power of the maker of the instrument to alter or vary it at pleasure. *Clavering* v. *Clavering* (c), *Naldred* v. *Gilham* (d), *Boughton* v. *Boughton*. (e)

[My note of the arguments in this case being very imperfect, I have been induced to subjoin in a note the substance of opinions of counsel taken upon the occasion mentioned below, and which were the foundation of most that was afterwards urged on both sides at the hearing.] (f)

The

(a) 2 Bro. C. C. 38. And see the other cases referred to in his Honour's judgment.

(b) Pre. Cha. 474. 1 Eq. Ab. 342. and more fully stated in *Sugden* on Powers, Appendix, No. 2.

See also Sugd. on Powers, sect. 7. p. 303. & seq. second edition.

(c) 2 Vern. 473.

(d) 1 P. Wms. 579.

(e) 1 Atk. 625.

(f) After the death of Mrs. *Wilkinson*, and before the bankruptcy of her husband, a case was submitted to counsel, in which, after stating the deed of separation, as recited in the deed of appointment, and also the deed of appointment, their opinions were asked as to the following queries:—

1 "Whether

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By a settlement executed by *Graham Wilkinson* and his wife, the estate in question in this cause, which had been

"Whether the deed of separation containing the power of appointment, and the deed of appointment made in pursuance thereof, can stand good as against a legal and *boná fide* purchaser, or against a creditor, who might prosecute a commission of bankruptcy against *Graham Wilkinson* grounded on an act committed long after the execution of the deed of separation? Or whether the deed of separation is void, and the subsequent appointment also, and Mr. *Wilkinson* has still an estate in fee in the premises (he now being in possession?")

1. "If the deed of the 16th of *March* 1780 was the only deed executed on the separation of Mr. and Mrs. *Wilkinson*, and there was no contract or arrangement between them, under which Mr. *Wilkinson* was benefited, his agreement in that deed to convey the estate, in the event of his surviving Mrs. *Wilkinson*, to such uses as she should appoint, was purely voluntary, and therefore falls within 1 *Jas.* 1. c. 15. s. 5. by which the commissioners of bankrupts are authorised to convey to the assignees all the bankrupt's lands and goods previously sold or disposed of by him, unless such sale or disposition of them was made on the marriage of his children or for some valuable consideration. If therefore a commission of bankrupt should be sued out against Mr. *Wilkinson*, though grounded on an act committed long after the execution of the deed of separation, the bargain and sale of the commissioners would vest the estate in the assignees for the benefit of the creditors. Independent of a commission of bankruptcy, by the 27 *Eliz.* c. 4. a settlement without a valuable consideration is void against subsequent purchasers. And it has been held that this extends to purchasers even with notice of the settlement. (*Evelin* v. *Templer*, 2 Bro. C. C. 148.) It should seem, therefore, that, on the supposition I have stated, of the transaction resting solely on the deed of separation, Mr. *Wilkinson*

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been originally her property, stood limited, in default of issue of their bodies, to the survivor of them in fee. A separation

Wilkinson may now make a good title to a purchaser of the estate, though that purchaser should have notice of the separation; and even without resorting to either of these statutes, as the legal estate is evidently vested in Mr. *Wilkinson*, it is very doubtful whether, if the separation deed is voluntary, a Court of Equity would decree either Mr. *Wilkinson* to execute a conveyance, or otherwise carry the agreement of that deed into execution."

2. "The appointment executed by Mrs. *Wilkinson*, under the power reserved to her by the deed of separation, is an effectual, valid, and existing appointment; not at all coming within the statute of *Elizabeth* in favour of creditors; and the same cannot be affected by any sale to be made by Mr. *Wilkinson*, or any act of bankruptcy committed by him; and no effectual means can be taken to destroy the effect thereof. Mrs. *Wilkinson* was a purchaser for a valuable consideration under the deed of separation, even if no clause is therein inserted (which I have no doubt there was) to indemnify Mr. *Wilkinson* against her debts. If any authority were necessary to be resorted to, the case of *Stephens* v. *Olive* (2 Bro. C. C. 90.) and the note of *King* v. *Brewer*, at the end of that case, are decisive on the question."

The case was then sent again to the gentlemen who had given these different opinions, and who wrote upon it as follows.

1. "The personal undertaking of the trustee to indemnify him generally against all Mrs. *Wilkinson's* debts might, perhaps, be considered a benefit to Mr. *Wilkinson*; and, if there be such a contract, might take it from the conclusion of law upon which the whole of my opinion proceeds. But, if there be no such covenant, and Mr. *Wilkinson* did not otherwise derive a benefit from the separation, I think the settlement would be considered to fall within the statutes, and would therefore be void against a purchaser for a valuable consideration, I have only to observe further,

A separation afterwards taking place between them, Mr. *Wilkinson* covenanted with a trustee to pay his wife an annuity

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ther, that the statute of *Elizabeth* contains a difference with respect to creditors and purchasers, and that this distinction is preserved in all the decisions upon the statute."

2. "I think that a separation alone between man and wife would be a good consideration within the statute 27 *Eliz.* but that a covenant from trustees is not only a good but a valuable consideration, and would take a conveyance out of the statute of either *Elizabeth* in favour of purchasers, or *James* in favour of creditors."

In consequence of the difference still prevailing in these opinions, a case was now submitted to two other gentlemen, in which, taking it for granted that a covenant from the trustee to indemnify Mr. *W.* from his wife's debts was contained in the deed of separation, and bearing it in mind that Mr. *W.* thereby agreed to pay, and did actually pay her an annuity of 70*l.* from the date of such deed of separation to the time of her death, and then paid the expenses of her funeral, the following *queries* were subjoined:—"Is a separation between man and wife considered, either in law or equity, a good consideration, within the meaning of the statute of *Elizabeth?* And, if a covenant to indemnify from debts actually exists, whether that is such a valuable consideration as to take the case out of the statute of *James?*"

1. "The separation of Mr. and Mrs. *Wilkinson*, on the terms of his allowing her a separate maintenance of 70*l.* *per annum*, guaranteed by the covenant of a third person from any debts she might contract, cannot be considered a valuable consideration within the statute 1 *Jac.* 1. c. 15. s. 5. If, therefore, the deed of separation and consequent appointment could be considered in the nature of a conveyance, I should be of opinion that, on a commission of bankruptcy being now issued against Mr. *Wilkinson*, the fee in question would pass by the commissioners' bargain, and sale under the above

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annuity of 70*l.* *per annum*, and to convey his contingent estate in fee to such person as she should by deed or

above statute, as if no such deed of separation or appointment had ever existed; and, consequently, that the assignees under such commission would be at liberty to sell the same for the benefit of the creditors seeking relief under such commission. But, inasmuch as the freehold is clearly in Mr. *Wilkinson*, he having never actually conveyed the same to the appointee, but only covenanted so to do, I am of opinion that, on this ground, (independently of the statute of *James*,) the commission of bankruptcy would operate upon it, the Court of Chancery having in several cases refused to carry voluntary contracts into execution against the assignees. Whether, without a commission of bankruptcy, Mr. *Wilkinson* himself could, under statute 27 *Eliz.* c. 4. make a good title in fee to a purchaser, appears to me a very doubtful point, in as much as the 4th section of that act provides that it shall not impeach any conveyance, assurance, &c. made upon a good and *bonâ fide* consideration. Now I strongly incline to think, that a good and *bonâ fide* consideration under this act will admit of a much more extensive construction than the valuable consideration required by the statute 1 *Jac.* 1. c. 15. s. 5. I therefore hold it by no means clear, that a purchaser from Mr. *Wilkinson* would hold the premises free from the contract contained in the deed of separation. At all events, I think, this point will fairly admit such difference of opinion, as to preclude all hopes of a purchaser, without the aid of a commission of bankruptcy. Upon the whole, I am of opinion, that a commission of bankrupt against Mr. *Wilkinson* would have the effect of appropriating the value of the fee in question towards the payment of his creditors, and that such measure is the only way under which that end can be obtained."

2. "If the contract of the trustees to indemnify Mr. *W.* against his wife's debts be a valuable consideration within the statute of the 1st of *James*, the deeds of separation and appointment are good

or will appoint. The trustee, on his side, covenanted to indemnify the husband against the wife's debts, and against

good against all the world;— if not, the fee simple of the estate may be sold by the assignee for the benefit of the creditors. And the cases of *Stephens* v. *Olive*, and *The King* v. *Brewer*, which decide in general terms that a contract of indemnity against a wife's debts is a valuable consideration, appear to me conclusive authorities in support of those two deeds. I conceive, further, that, if the consideration be such a good and valuable one, that the conveyance, if made, would not be set aside in favour of creditors, the Court would decree it to be made on an application to that effect from Mrs. *W.*'s appointee. See *Tyrrell* v. *Hope* (2 Atk. 562.), *Walker* v. *Burrows* (1 Atk. 94.) *Brown* v. *James* (Ib. 188.) In the last paragraph of *Tyrrell* v. *Hope*, the Master of the Rolls is reported to have said, that, though the wife was entitled in that case to relief against the assignees, yet it should be without costs, as it was their duty (being only trustees for the creditors at large) to bring a case so circumstanced before the Court. I think the present case doubtful enough to make the same thing proper here. The deeds in question might be attacked on the 13 *Eliz.* as I am informed that Mr. *Wilkinson*, at the time of their execution, was considerably in debt, and Lord *Hardwicke*'s declaration might be relied on (1 Atk. 15.) that he had 'hardly known one case, where the person conveying was indebted at the time of the conveyance, that had not been deemed fraudulent.' But the strongest ground of argument would arise from the distinction between *Stephens* v. *Olive*, which turned upon 13 *Eliz.*, and the present case, falling within the 1st *James*. An appeal might be made to the partiality of the Court to creditors under a commission, sanctioned and enjoined by the first section of 21 *Jac.* 1. c. 19. which enacts 'that all laws against 'bankrupts shall be largely 'and beneficially construed 'for their aid, help, and relief.' From the use of the word '*valuable*,' in 1 *Jac.* 1. (not 'good and *bonâ fide*' as in other places,) an intention might be presumed in the legislature to protect no considerations against creditors but such as have produced

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against any demand for alimony which she might at any time make.

She

produced some certain actual benefit to the estate, capable of enriching it before the bankruptcy, or afterwards of being divided among the creditors. This restricted signification would effectually exclude a personal contract, under which it is merely possible that the bankrupt might be relieved from a liability which might never occur; from which contract, in point of fact, Mr. *Wilkinson* derived no benefit. The particular circumstances may also be brought forward; as that the annual value of the estate was less than the allowance secured by the deed of separation, and actually paid to the wife; and that, whereas in *Stephens* v. *Olive* the conveyance was made for the provision of the debtor's wife and children, the bankrupt in this case parted with his interest for the emolument of any stranger his wife's caprice might pitch upon."

After the commission of bankrupt had issued, a third case was submitted to Counsel on behalf of the assignee, with the following *queries:*

"1st. Does the estate pass by the bargain and sale, and can the assignee make a marketable and sufficient title thereto?

2d. "Is it necessary that a notice should be given of the settlement and separation, &c.; and if so, how would you advise it should be done?"

Opinion.

"If the deed of separation contained a covenant from Mrs. *Wilkinson*'s brother and trustee, Mr. *Worrall*, against her husband's being sued by her in the Spiritual Court, and against his being liable for her future debts, I strongly incline to think that there would be consideration enough to support Mr. *Wilkinson*'s covenant for conveying the remainder in fee, in the contingency which was described, and has happened, both at law and in equity, against his assignee. My first impression was very much to the contrary: but such impression has been overcome. It has been so partly by reading the masterly consideration of the subject of settlements on voluntary separation between husband and wife in *Roberts*'s Treatise on the

She executed an appointment in favour of the plaintiffs, by a deed properly attested, in which she did not reserve to herself any power of revocation. A few days after the execution she directed an interlineation to be made in the deed, giving to Mrs. *Worrall*, the mother of the plaintiffs, a life estate, in priority to the limitation previously made to them, and then she re-executed the deed.

Mr. *Wilkinson* survived his wife,—he became a bankrupt, and is now dead. The bill is filed by the plaintiffs, as appointees of Mrs. *Wilkinson*, for a conveyance of the estate, agreeably to Mr. *Wilkinson*'s covenant, and for an account of the rents and profits since his death.

On the part of his assignees, two objections are made to this claim. First, it was said, the Court will not

the statutes of 13th and 27th *Eliz.* It has been partly also overcome by a consideration of the principles which appear to have been adopted by the King's Bench in two cases since its publication; namely, the cases of *Nun* v. *Wilsmore* (8 Durnf. and East, 521) and *Lord Rodney* v. *Chambers* (2 East. 283.) I say, upon the principles of those two cases, because neither of them was on the bankrupt statutes. However, in respect of matter somewhat of a contrary tendency, which appears to have come from Lord Chancellor *Rosslyn*, in *Legard* v. *Johnson*, (3 Ves. 352.) and from Lord *Eldon*, in *Beard* v. *Webb*, (2 Bos. and Pull. 105.) relative to deeds of separation, I recommend it to the assignees not to act upon my single opinion; and, perhaps, upon consulting other counsel it may, if the assignees have agreed to sell, be found advisable to endeavour at fixing upon some short mode of trying the point with a purchaser, in case of his refusal to accept the title, on the ground that the bankrupt's covenant to convey the remainder in fee to his wife's appointees was fraudulent as against those claiming under the commission of bankrupt."

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execute any covenant contained in a deed of separation between husband and wife.—Secondly, That this covenant is void, as against creditors, for want of a sufficient consideration to support it; Mr. *Wilkinson* having been a trader when the deed of separation was executed.

If these objections do not prevail, and the covenant is to be executed, then, on the part of Mrs. *Worrall*, it is contended, that the limitation to her for life was well introduced into the deed of appointment.

A Court of Equity will not execute articles of separation; notwithstanding which it is held that engagements between the husband and a third party (as a trustee,) though originating out of, and relating to, a separation, are valid, and may be enforced by the Court.

As to the first point, I apprehend it to be now settled, that this Court will not carry into execution articles of separation between husband and wife. It recognizes no power in them to vary the rights and duties growing out of the marriage contract, or to effect, at their pleasure, a partial dissolution of that contract. It should seem to follow, that the Court would not acknowledge the validity of any stipulation that is merely accessary to an agreement for separation. The object of the covenants between the husband and the trustee, is to give efficacy to the agreement between the husband and the wife; and it does seem rather strange, that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit, and the policy, of the law. It has, however, been held, that engagements entered into between the husband and a third party shall be held valid and binding, although they originate out of, and relate to, that unauthorised state of separation, in which the husband and wife have endeavoured to place themselves. I am, therefore, only to repeat what the Lord Chancellor has said in the case of *Lord St. John* v. *Lady St. John* (*a*)—"If this were *res integra*, untouched by "dictum or decision, I would not have permitted such

(*a*) 11 Ves. 537.

"a covenant

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"a covenant to be the foundation of an action, or a suit "in this Court. But, if dicta have followed dicta, or "decision has followed decision, to the extent of settling "the law, I cannot, upon any doubt of mine, as to "what ought originally to have been the decision, shake "what is the settled law upon the subject."

A covenant to indemnify the husband against the wife's debts, is a sufficient valuable consideration within the statute, even though the husband lives apart from his wife, and a separate maintenance is provided for her.

As to the second point, I think I must, upon the evidence, hold Mr. *Wilkinson* to have been a trader at the time when he executed this deed. He certainly was in trade before, and it does not distinctly appear that he had given up business at the period in question. Then, is this a covenant for a valuable consideration, within the meaning of the statute? (*a*) Mr. *Wilkinson*, as I have before stated, stipulates, on the one side, to pay his wife an annuity of 70*l.* *per annum*, and to convey according to her appointment; and the trustee, "for the "considerations aforesaid," engages to indemnify the husband against debts and alimony. It was said, that an indemnity against the wife's debts is an indemnity against nothing, as the husband, living apart from his wife, and allowing her a separate maintenance, is not liable to pay her debts. That, however, is too largely stated—for questions frequently arise, as to the husband's liability, notwithstanding a separate maintenance is provided for the wife. The sufficiency of the maintenance, according to the condition and fortune of the parties, is held to be a question for the consideration of the jury. This covenant may, therefore, afford a most important protection to the husband, and throw a burthensome obligation on the trustee. In *Hyde* v. *Price* (*b*), Lord *Alvanley* calls it a very material covenant, although at that time it was held that a married woman, having a separate maintenance, might herself be sued

(*a*) 1 Jac. 1. cap. 15. s. 5. (*b*) 3 Ves. 437.

for

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for the debts she contracted. And it is not against debts alone, but against any claim of alimony, that the husband is in this case indemnified. A covenant of indemnity, even against debts, has so often been held to amount to a valuable consideration, that I do not think myself at liberty to treat it as an open question. Though Lord *Hardwicke* had no occasion expressly to decide it in *Fitzer* v. *Fitzer* (*a*), yet he laid great stress on the absence of such a covenant. The case affords, therefore, an argument by implication in favour of its effect. In *Stephens* v. *Olive* (*b*), it was held by Lord *Kenyon* to be a covenant for a valuable consideration. The same point was ruled by Lord *Rosslyn* in the case of *The King* v. *Brewer* (*c*); and Mr. Justice *Buller*, in *Compton* v. *Collinson* (*d*), says, that "the deed made on the separation was clearly founded on a good and valuable consideration, the husband being indemnified from all debts which the wife may contract." No contrary determination has been cited; and, therefore, I must hold, that this covenant, being grounded on a valuable consideration, is to be specifically performed.

A voluntary deed, once perfected, cannot be revoked at pleasure, even though the maker has retained it in his own custody. And where the deed is in execution of a power, the mere attempt to

As to Mrs. *Worrall*'s claim, the objection to it is, that, as Mrs. *Wilkinson* had reserved no power of revocation, she could not insert a limitation, which had, *pro tanto*, the effect of revoking the appointment she had already made. The answer attempted to be given to this objection, was, that, as this was, on the part of Mrs. *Wilkinson*, a mere voluntary deed, which had not been out of her own custody, she might cancel or revoke, and *à fortiori* alter it, at her pleasure. But there is, I conceive, no authority for the proposition so broadly stated. The case of *Clavering* v. *Clavering* (*e*) is a di-

(*a*) 2 Atk. 252. 511.
(*b*) 2 Bro. C. C. 90.
(*c*) Bro. C. C. 93, note.
(*d*) 2 Bro. C. C. 38.
(*e*) 2 Vern. 473.

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rect authority the other way. Both deeds were, in that case, alike voluntary. Neither had ever been out of the possession of the grantor. Yet it was determined, first by the Court of Chancery, and afterwards by the House of Lords, that the first deed was not revoked by the second. The case of *Naldred* v. *Gilham* (*a*) turned on its own particular circumstances, as is observed by Lord *Hardwicke*, in *Boughton* v. *Boughton*. (*b*) Sir *Joseph Jekyll* had conceived it to be so clear that a voluntary deed, once perfected, could not be revoked at pleasure, that he established the copy of the first deed, though the original had been destroyed by the maker. If Lord *Macclesfield* had meant to affirm the proposition stated on the part of Mrs. *Worrall*, he would only have had to say, in three words, that, as the first deed was voluntary, and had been cancelled by the maker, the second must necessarily prevail. Instead of this, he enters into a detailed consideration of all the circumstances of the case, and thinks himself warranted to infer from them, that Mrs. *Naldred* had been imposed upon in making the first settlement an absolute conveyance. Here, there is not the least evidence of mistake, or misapprehension, in framing the deed, as it at first stood. The mere attempt to vary the disposition cannot, of itself, prove, that the omission of a power of revocation was occasioned by fraud or mistake; for then the second disposition must in every case prevail. All it shews is, that the party mistook the law, and conceived that a deed might be altered or revoked, though no power of revocation had been reserved.

vary its dispositions, cannot of itself prove, that the omission of a power of revocation in the deed creating the power of appointment was occasioned by fraud or mistake.

I am of opinion, that it is the appointment, as it originally stood, that is to be carried into execution.

(*a*) 1 P. Wms. 579. (*b*) 1 Atk. 625.

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August 7.

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A. guarantees the payment of any goods to be supplied by B. to C. between the 2d of April 1814 and the 2d of April 1815.

Although no period of credit was specified, this could not be taken as a guarantee for an unlimited period, but to be restrained by the usual course of trade; and C. having accepted bills for the amount of the goods delivered, which B. permits him to renew when payable without any communication to A. on the subject of such renewal; Held, that A. was discharged from his guarantee, by virtue of the rule that a creditor giving further time to the principal debtor, without the consent of the surety, releases the surety. And that, although it was proved that the renewal was given only in consequence of C.'s inability to pay, and that no injury could accrue to A.; the surety being himself the fit judge of what is, or is not, for his own benefit.

THE Bill stated that in *April* 1814 the plaintiff was applied to by a person of his acquaintance named *Henry*, a woollen-draper at *Liverpool*, to guarantee the payment of the amount of certain goods which he was about to order from the defendant, a manufacturer at *Leeds*, representing to the plaintiff that his orders should not at any one time exceed 800*l.*, and that the defendant also understood and expected that such proposed guarantee would not at any time render the plaintiff liable beyond that amount. That, upon the faith of these representations, the plaintiff consented to give the guarantee which was requested of him for one year only, and accordingly signed a memorandum to the following effect: "*Liverpool*, 2d *April* 1814. Messrs. *Howarths* and Co. Gentlemen,—We engage to guarantee to you the payment of any goods you may supply to Mr. *Isaac Henry* between the 2d of *April* 1814 and the 2d of *April* 1815."

The bill went on to state that goods were afterwards supplied by the defendant to *Henry* at various times within the succeeding twelvemonth, to an amount very far exceeding 800*l.*, and which were sent at a credit of six months as to part, and of nine months as to other part, payable at the expiration of such respective credits in bills at three months' date; and that, at the expiration of such respective credits, *Henry* accepted bills for the amount, payable at three months accordingly. That,

instead

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instead of enforcing payment of the bills so accepted, the defendant in every instance permitted *Henry* to renew the same by giving or accepting other bills at extended periods, and which renewed bills were afterwards again renewed; thus giving further time for the payment at the expiration of the credit which originally had been so given; and that this was done without the knowledge, privity, or consent of the plaintiff, who was never informed of the irregularity in the payments, or of any of the aforesaid transactions, until the month of *June* 1816, (previous to which *Henry* had been found bankrupt under a commission,) when he received notice of an action intended to be commenced against himself and *Henry* upon the bills which had become due; and which action had since been actually commenced pursuant to such notice.

The bill prayed that the guarantee so as aforesaid given and signed by the plaintiff might be declared to be at an end and altogether void; or, if necessary, that an account might be taken of the amount of any liability of the plaintiff under the same, and that, upon payment thereof the said guarantee might be delivered up to be cancelled; and an injunction to restrain proceedings at law in respect thereof.

The defendant by his answer stated, that *Henry* having applied to the defendant to supply him with goods upon credit, the defendant declined so to do unless *Henry* would procure some respectable person to be his guarantee for the payment of the amount, upon which *Henry* proposed the plaintiff as such guarantee, and thereupon the defendant accompanied him to the plaintiff's house, and, after some consideration, the plaintiff agreed to guarantee to the defendant payment for all such goods as *Henry* should have from him between the

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2d of *April*, 1814 and the 2d of *April*, 1815, in case *Henry* did not or could not pay for them, and thereupon he gave such written guarantee as in the bill stated; but he denied that, on such application, any limitation was mentioned as to the amount of goods to be furnished, or otherwise than as to the period within which they were to be delivered. The answer admitted that, at the expiration of the respective periods of credit at which the goods were delivered, *Henry* did give bills and acceptances to a certain amount in payment for such goods, and said that the dishonour of such bills and acceptances, and of others given to replace them, and the inability of the defendant to obtain payment from *Henry*, were the cause of the plaintiff being now called upon under his guarantee, it having been expressly understood and agreed between them that the defendant should use all practicable means, according to his discretion, for obtaining payment from *Henry*, by the renewal of bills or otherwise, without prejudice to his right so to call upon the plaintiff. That the defendant verily believed the course he had taken to be the most effectual, and the best according to circumstances, for the purpose of obtaining payment, and that, if he had had recourse to legal proceedings to enforce the payment, he should not have obtained so much as he had obtained by the course actually adopted; but that if the plaintiff had desired him to take legal proceedings, he should have complied with such request. That he believed, on every occasion of renewing such bills, *Henry* was in fact, as he represented himself to be, utterly incapable of paying the same, and that he never gave further time for payment otherwise than by such necessary renewals; admitting, however, that he did not consult the plaintiff on the occasion of such renewals, or apprize him of the circumstances under which the same were made, and consequently that further time was, in such instances, actually given

given without the plaintiff's express consent, but not, as he believed, in any of such instances, without his knowledge. That the plaintiff knew, and it was so understood and expressed at their first meeting, that the goods were to be sold at the usual credit: and that the periods of credit so as aforesaid given by the defendant to *Henry* were the usual periods. That the defendant frequently informed the plaintiff by letter of the irregularity of *Henry* in paying his bills and acceptances, but that the plaintiff never took any notice of such letters, and on the contrary fraudulently denied to the defendant's agent that he had given any guarantee, and told him that he knew nothing about it. The answer then stated various circumstances, from which the defendant inferred that the plaintiff acted in concert with *Henry*, and was well aware of the state of all the transactions in which he was concerned, and with every circumstance relating to the renewals of bills, to which he never stated any objections; and it admitted that the defendant, consequently, knowing of no objections on the plaintiff's part, and thinking it of advantage to all parties, agreed to a proposal of *Henry*'s for a further renewal, which was given accordingly; submitting that, under such circumstances, the plaintiff was not discharged by any act of him (the defendant) from his liability under the guarantee which he had given, and that he (the defendant) was therefore not bound to relinquish the same.

An injunction having been obtained on the filing of the bill, *Hart* and *Wray* now shewed cause against dissolving the same.

The guarantee given by the plaintiff as surety for *Henry* was absolutely discharged, under the circumstances of this case, by the defendant's giving further

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time to the principal without communication to the surety. *Nisbet* v. *Smith* (a), *Rees* v. *Berrington*. (b)— If the credit originally given was in the regular course of trade, and the transaction can on that ground be so far supported, the renewal of the bills and acceptances cannot be so considered, and, being granted without the plaintiff's privity, falls within the principle of these cases. The fact, as to the limitation of the amount which the guarantee was intended to cover, to 800*l.*, is denied by the answer;—but it is immaterial to the question of exoneration. The conviction alleged by the defendant of *Henry*'s inability to pay previous to his consenting to a renewal, does not alter the case. He ought to have communicated his intention to the plaintiff; and the circumstances that the surety did not in fact sustain any injury, but derived even an actual benefit from the time so given to his principal, was considered by Lord *Thurlow* as not invalidating his claim to be discharged upon the strict technical rule. See also *Boultbee* v. *Stubbs*. (c)

Horne, for the defendant.

The arguments used in favour of the plaintiff's claim to be discharged apply only to a case in which the amount of credit, the time and mode of payment, have been precisely specified. Here, the bill alleges that the amount was restricted to 800*l.*: but that has not been shewn to be the fact,—it does not appear on the face of the guarantee given, and the fact that there was any such

(a) 2 Bro. C. C. 579

(b) 2 Ves. jun. 540. See *Devaynes* v. *Noble*, ante, Vol. I. p. 549. and Cooke's Bank. Laws, 167. (5th Ed.) as to the acceptor of a bill of exchange being discharged by time given to the drawer.

(c) 18 Ves. 20. *Bowmaker* v. *Moore*, 3 Price, 214. *Moore* v. *Bowmaker*, 6 Taunt. 379. 2 Marsh. 82. 392.

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such agreement is denied by the answer. This is not a guarantee for the payment of a particular sum at a particular period, but of all goods to be delivered between the month of *April* 1814 and the month of *April* 1815; and it says nothing as to the time of payment. The defendant was not bound, in order to render the plaintiff liable under his guarantee, to use any other diligence than he actually has used in obtaining payment of the bills from *Henry*; and, with regard to the renewals being given without the consent of the surety, the inability of *Henry* to pay was well known to the surety;—he was informed of such inability by the defendant himself; and he must have known of the renewals, although not expressly made acquainted with them by the defendant, nor consulted with respect to them previous to the arrangement being made. The benefit which the plaintiff himself has derived from the transaction, and the circumstance that his remedy against the principal is now as good as it ever could have been, are not to be passed over, or regarded as of no moment in such a transaction. The credit understood to be given was indefinite in extent, and cannot be limited by any arbitrary rule of convenience.

The LORD CHANCELLOR.

The guarantee given in this case is general in its terms; and must be construed, according to its legal effect, in favour of the surety.

The liabilities of sureties are governed by principles which have been long settled in equity, and are now adopted in courts of law.—I say, *now*, because the Court of Common Pleas formerly held a different doctrine. But at present it is firmly established that the same principles which have been held to discharge the surety in equity will operate to discharge him also at

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law. However, as the same relief is to be obtained in both, a Court of equity will not send a party who is suing here to a Court of law for the discharge to which he is equally entitled in this place.

The rule is this — that, if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and the principal — not where the creditor is merely inactive. And, in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, or not; and because he, in fact, cannot have *the same* remedy against the principal as he would have had under the original contract.

Now, in the present case, the creditor has been supplying goods to the principal debtor, from time to time, upon a certain credit, the extent of which, not being expressly stipulated between the parties, I must take to be credit given according to the usual course of trade. The surety says, I will be answerable for the amount of such goods as you shall furnish during the period from the 2d of *April* 1814 to the 2d of *April* 1815. It is impossible for me to hold that this is an engagement by which he (the surety) has rendered himself liable for an indefinite time beyond the expiration of the period limited for the delivery of the goods. It cannot be supposed that the plaintiff meant he should continue liable after the 2d of *April* 1815, so long as the defendant might choose to renew the bills of the principal debtor. You cannot contend in support of such an extravagant proposition. It has been truly stated that the renewal

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of these bills might have been for the benefit of the surety; but the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is, or is not, for his benefit. The creditor has no right—it is against the faith of his contract—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety.

Injunction continued.

ROLLS.
August 25.

BRICKWOOD v. MILLER.

[The facts of this case are fully stated in the judgment of the Master of the Rolls. I was not present during the arguments of counsel.]

The MASTER *of the* ROLLS.

THE plaintiffs are assignees of *Thomas Ibbott Pierce*, a bankrupt, who was a partner in two houses originally formed in the *West Indies*; the one under

P. a partner in two houses of trade originating in the *West Indies* where his partners continue to carry on the business, but being himself resident in *London*, receiving and disposing of consignments from, and shipping cargoes to, his partners abroad, becomes bankrupt. On bill by his assignees against a creditor of the two firms, having attached in the *West Indies* property belonging to both, for an account of what he had received by means of his attachments, *Held*, that the defendant was entitled to retain what he had received, to the extent of satisfying his joint debts, and to account only for the overplus.

Different from the cases where the bankrupt was the sole debtor, and where the trade was in *England* only, and the attachments laid in *London*.

the

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the firm of *Thomas Ibbott Pierce* and *Co.*, which consisted of *Pierce* himself and *William Brown*; the other under the firms of *William Brown* and *Co.*, which consisted of *Pierce* and *Brown*, and also of *Joseph Lambott* and *George Fitzwilliam*. *Brown* is dead. *Lambott* and *Fitzwilliam* are made defendants, but are out of the jurisdiction, and have never appeared, or answered. The material defendant is *James Richard Miller*, who, claiming to be a creditor of the two firms, has attached in the *West Indies* property belonging to them both. And the principal question in the cause is, Whether *Miller* can be compelled by the assignees of the bankrupt partner to account for what he has received by means of his attachments.

I have already stated that the partnerships had been formed in the *West Indies*: but soon after their formation, *viz.* in 1802, Mr. *Pierce* came over here, and established himself in *London*, for the purpose of conducting the English branch of the business of the two houses. He received and disposed of the consignments from the *West Indies*, and shipped cargoes from hence to his partners there.

A commission of bankruptcy issued against him in *January* 1805, grounded on an act of bankruptcy alleged to have been committed in the preceding *October*. This bill, however, was not filed till seven years afterwards. The case which it brings before the Court does not appear ever to have been the subject of judicial decision. In *Sill* v. *Worswick* (*a*) and *Hunter* v. *Potts*, (*b*) where the English creditor was forced to refund what he had recovered under a foreign attachment, the bankrupt was a sole debtor, and not one of several

(*a*) 1 H. Black. 665. (*b*) 4 T. R. 182.

partners:

partners; and it was in England alone that he had any commercial establishment. In *Barker* v. *Goodair* (*a*) and in *Dutton* v. *Morison* (*b*), where the Lord Chancellor granted an injunction against the proceeding by attachment, the case was, indeed, that of the bankruptcy of one of several partners; but the commercial establishment was in this country alone, and it was in *London* that the attachments were laid. But here the partnerships are at least as much *West Indian* as *Englssh* establishments, and it is in the *West Indies* that the attachments are laid. Now it is contended for the defendant, that the bankruptcy of the partner resident in *England* could not affect the partners remaining at home, in a country not subject to the bankruptcy law, so as to divest them of the management of the partnership concerns, or the disposition of the partnership property. If they applied the partnership assets in the payment of the partnership debts, or if, in a legal course of proceeding against them, the debts were recovered according to the law of the country, there exists, it was said, no jurisdiction here to force a partnership creditor to refund what he has so received or so recovered. The case so put appeared to me to be a very strong one. Even in the less difficult case of the attachment abroad of the property of a sole debtor, residing, and becoming a bankrupt, in this country, I doubt whether all the reasoning of Lord Chief Justice *Eyre* in *Hunter* v. *Potts* has ever received a completely satisfactory answer.

It does seem an anomalous proceeding for the Courts of one country to take from a man what has been

(*a*) 11 Ves. 78. (*b*) 17 Ves. 201. 1 Rose, 213.

adjudged

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adjudged to him by the Courts of another. Assuming however, as I ought to do, that those decisions are right, do they necessarily govern the present case? To what extent the bankruptcy of one partner affects the power of the others over the partnership property, is perhaps still a matter of some uncertainty. In *Fox* v. *Hambury* (*a*), Lord *Mansfield* expresses a clear opinion, that any fair disposition of the partnership assets by the solvent partner would stand good against the assignees of the bankrupt. The case, however, went off upon the form of the action, as in all events trover could not be maintained by one tenant in common against another. In the case of *Coldwell* v. *Gregory* (*b*), Lord Chief Baron *Thomson*, delivering the judgment of the Court of Exchequer, says, "It "would be a monstrous thing to say, that if an indi-"vidual in a firm become bankrupt, the other solvent "partners may be stripped of their property, and thus "be deprived of the means of satisfying the part-"nership debts." In *Smith* v. *Goddard* (*c*), the Court of Common Pleas left it a doubtful point, whether any part of a sum paid to a creditor, after the bankruptcy of one partner, could be recovered back. They held clearly that the whole could not. On the other hand, the *Lord Chancellor*, in *Barker* v. *Goodair*, and in *Dutton* v. *Morison*, holds that the effect of the bankruptcy of one partner is to render it necessary to take an account of the joint estate, and to apply it just as if the whole firm had become bankrupt; and therefore granted an injunction against the proceeding by attachment Lord *Rosslyn* had held a directly opposite opinion in *Bristow* v. *Potts* (*d*), where he

(*a*) Cowp. 448.

(*b*) 1 Price, 119. 130. and 2 Rose, 149.

(*c*) 3 Bos. & Pul. 465.

(*d*) 11 Ves. 81, note.

decided

decided that the assignees of one of the joint debtors had no equity to obtain an injunction against creditors who had attached the joint estate.

It is to be recollected, that in the cases before the *Lord Chancellor*, the domicil of the partnership, if I may so express it, was completely *English*; that all its concerns were subject to the *English* law; and that it was by a proceeding in this country that the creditors were endeavouring to disappoint the arrangement, which His Lordship conceived it competent to him to make, for the equal distribution of the partnership property. And, even then, he says in *Dutton* v. *Morison*, that there is infinite difficulty in the case. But the difficulty seems to me to be insuperable, where a partnership, originating in another country, has at least a divided establishment, and some of the partners continue to reside and carry on the trade in that other country. How are the *West Indian* partners to be controuled in the management of their trade, or restrained, by any proceeding here, from paying and applying the partnership assets as they think fit?—Equality of distribution cannot possibly be attained. Are we then to tell a creditor, that, because he happens to reside in *England*, and his debt has been contracted there, he shall not be allowed to take such remedies against his foreign debtor as the laws of their country may permit? In the cases before the *Lord Chancellor*, the Court, taking from the creditor his separate remedy, professed to give him his distributive share of the whole partnership property. But it cannot, in this case, reach the *West Indian* property, or bind the *West Indian* partners. Then you would take from the partnership creditor one remedy, without substituting any other in the place of it. This would be to say, that the

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West India property must be left for any creditors but *English* creditors.

Then, if *English* creditors are not to be restrained from suing, it would be incongruous to force them to refund what they have recovered.

I think, consequently, the defendant is entitled to retain what he has recovered or received from the *West Indies*, to the extent of satisfying the joint debts due to him. If he is overpaid, (as he must be if the plaintiffs are right in their proposition that only a very small sum was originally due to him,) they have a right to the surplus; which will be applicable as any other joint property that may have come to their hands. There must, therefore, be an account of what was due to him from the two firms at the time of *Pierce*'s bankruptcy, and of what he has since recovered or received.

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June 5.
August 25.

HAZARD and HOLLAND, PLAINTIFFS;
AGAINST
LANE, Widow, and LLOYD and Wife,
DEFENDANTS.

Reference of a solicitor's bill of costs to be taxed, upon the application of one of two trustees and executors by whom he had been employed in the conduct of the cause and in other matters relating to the executorship,—the executor making the application not having acted, and his acting co-executor refusing to consent to the application,—the bill having been long since paid by the acting executor,—but unknown to the parties beneficially interested; and no settlement of the executorship accounts having been made, notwithstanding repeated applications, until lately, and the *Cestuy que trust* (one of them a married woman) having executed a release to the executors.

Motion on behalf of the solicitor to discharge the order of reference refused,—the *Cestui que trust* having a right to use the name of his trustee for the the purpose of taxation, and the release to the executors not operating to prevent him from prosecuting against the solicitor the remedy given him by statute.

THIS was an application on the part of the solicitor for the plaintiffs, "that an order made in the above cause, dated the 23d of *January* last, upon the application of the plaintiff *Holland*, might be discharged, with costs to be taxed by the Master and paid by the said plaintiff, and that in the mean time all proceedings under the order might be stayed."

The order sought to be discharged was drawn up in the following terms:—

"Upon motion this day made by Mr. *Parker*, of counsel for the plaintiff *Holland*, it was alleged that the said plaintiff formerly employed *F.* (on whose behalf the present application was made) as solicitor for him in this and other causes and matters, and the said *F.* has lately delivered to the plaintiff *Holland* his bills of fees and disbursements—that the said plaintiff submits to pay him what (if any thing) shall appear due to him on taxation of his said bills, and therefore it was prayed, &c. Whereupon, and the said plaintiff submitting

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mitting to pay, &c. His Lordship doth order, that it be referred to (the Master) to tax the bills of fees and disbursements delivered by *F.* to the plaintiff *Holland* in this and other causes and matters; and, in order thereto, all parties are to be examined, &c., and to produce, &c.; and that the plaintiff *Holland* do, according to his said submission, pay to *F.* what (if any thing) shall appear due to him on such taxation; and thereupon, or in case it shall appear that he is already paid, the said *F.* is to deliver to the said plaintiff, upon oath, all books, papers, &c. in his custody belonging to the said plaintiff; and, in case it shall appear that he is over-paid, he is to refund to the said plaintiff what the Master shall certify to be over-paid."

The facts of the case were these:—

The Plaintiffs were trustees and executors named in the will of *Lane*, (the father of the defendant Mrs *Lloyd*,) under which will the defendants *Lloyd* and his wife, in right of the wife, (who was an infant at the time of filing the bill,) are parties beneficially interested.

It appeared by the affidavit of the solicitor made in support of the present application, that in *August* 1804 he was employed by the plaintiff *Hazard*, (who seems to have alone acted in the trusts of the will,) to file a bill on behalf of himself and his co-trustee and executor *Holland*, to carry the said trusts into execution; being also employed by *Hazard* in various other matters connected with the settlement of the testator's affairs. That, in *December* 1805, he delivered to *Hazard* his first bill of costs on account of such business, amounting to 86*l.* 19*s.* 1*d.*, and in the

year

year 1813 a further bill amounting to 125*l.* 3*s.* 11*d.*; and that on the 31st of *December* 1807, *Hazard* paid him, in discharge of his first, and on account of his subsequent bill, the sum of 116*l.*; and the further sum of 96*l.* 3*s.* (being the balance of the two bills) on the 19th of *April* 1814. The affidavit further stated, that no objection had been made to any of the charges contained in these bills, and no previous notice given to the deponent of an application being made to the Court for a reference of taxation, but that the first intimation he received thereof was by service of a copy of the order in question. That in *August* 1816, *Hazard* finally settled his executorship account with the defendants *Lloyd* and his wife, in which account were included and allowed the aforesaid payments, and *Lloyd* and his wife thereupon executed to the plaintiffs a release of all claims under the will, with full knowledge of, and acquiescence in, such payments.

On the other hand, the defendant *Lloyd*, by an affidavit filed in support of the order of reference, stated, that besides the affairs of the executorship in question, *F.* (the plaintiffs' solicitor) was also employed to prepare a settlement which was made on the marriage of the defendants, in which settlement the plaintiffs were named as trustees;—that the whole of the business was completed in *September* 1807, except the final settling of accounts, and that from that time to the year 1816 the defendant *Lloyd* made frequent applications to *Hazard*, and also to *F.* (the solicitor) for such final settlement and for the delivery of the bills of costs of the latter, but was constantly put off with frivolous and dilatory pretences, and was unable to procure any settlement till the 22d of *August* 1816, on which day *F.* called on the defendant and delivered to him the executorship accounts together with the two bills of costs

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in question, in which the plaintiffs were made debtors to *F.* as executors, for business concluded in *September* 1807, as aforesaid. That, on looking into the accounts, he found the amount of both bills therein charged to the debit of himself and his wife, and there appeared on the face of the accounts to be only a trifling balance due to the defendant, which was thereupon paid to him accordingly. That, together with the accounts and bills of costs, *F.* also brought and tendered to the defendant a general release (ready-prepared for signature) of all the claims and demands of himself and his wife upon the executors, which he forthwith signed, without having had any opportunity of examining the bills or consulting any professional person as to their propriety; but, shortly afterward, on delivering the bills to his solicitor for his perusal, he was informed that they contained many over-charges, and other improper charges, upon which he resolved to apply to have the same taxed. The affidavit then stated applications to have been made by the defendant's solicitor to both the plaintiffs for their consent to a reference of taxation, (the application for which it was necessary should be made in their names or in the name of one of them) at the same time offering to indemnify them against the costs and expenses which might be incurred thereby—that, no answer having been returned to such application, the defendant himself, together with *Holland*, called upon *Hazard* for the same purpose, when *Hazard* peremptorily refused his consent, but *Holland* consented; and the application was then made to the Court, and the order obtained, in the sole name of *Holland* accordingly. The affidavit went on to point out several items in the bills of costs, which appeared to be gross over-charges; insisting that under these circumstances, the defendants were entitled to have the bills taxed, notwithstanding the release which they had executed to the plaintiffs.

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In support of the application to have the order of taxation discharged, it was contended, that the order could not be supported, first, as it purported (upon the face of it) to be an order to tax the costs of the plaintiff *Holland*, whereas in truth they were the costs of both the plaintiffs; and, secondly, on account of the business having been done so long ago, the plaintiff *Holland* having been allowed the same in his accounts, and a general release having been executed to him.

To these objections it was answered, in defence of the order, first, that the bills of costs, as described in the order, were delivered to *Holland* by the solicitor for the plaintiffs, as their solicitor "in this and other causes and matters," under which description it was immaterial whether they were the separate bills of *Holland*, or the joint bills of *Holland* and *Hazard*. That, although in point of fact the bills were not delivered to *Holland*, yet he was (jointly with his co-executor) liable to the payment of them, and the delivery to either would sustain an action against both. And, as to the execution of the release, this was the case of a trustee called upon by his *cestui que trust* to assist him in having certain bills of costs taxed, which, from a sense of duty, he had agreed to do—and what connection had this with the release which he had executed, to which *F.* was no party, and the taxation of his bill a mere matter between himself and his employers, as to which no release existed? That if, as alleged in his affidavit, the bills were actually delivered to *Hazard* in 1806 and 1807, that circumstance could make no difference in the present case; the delivery of the bills not having been acted upon until *August* 1816, when they were first delivered to the defendant; and when it was clear that *Hazard*, if he had ever possessed them, must have himself returned them to his solicitor;—and, with regard to the fact of the delivery at

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at all, it was observable that *Hazard* had made no affidavit, and that, upon the whole, it was evident that this was a case of gross collusion between *Hazard* and the solicitor for the plaintiffs.

Sir *S. Romilly*, in support of the application to discharge the order of taxation.

Agar and *Parker*, in support of the order, referred to the provisions of the statute, 2 *Geo.* II. c. 23. s. 23. which would be defeated, and rendered altogether nugatory and abortive, if, in a case like the present, one of the parties chargeable refusing his consent to the order of reference, should be held a sufficient ground for denying the benefit of the taxation to the persons beneficially interested. That, where any part of a solicitor's bill relates to business done in this Court, the whole may be taxed, although part of the business was for other persons jointly with the party applying. *Margerum* v. *Sandiford* (*a*). And, with regard to the release given to the executors, and the objections founded on length of time and acquiescence, they cited *Walmsley* v. *Booth* (*b*). *Newman* v. *Payne* (*c*). (See also the late cases of *Langstaffe* v. *Taylor* (*d*), *Cook* v. *Settree* (*e*), *Plenderleath* v. *Fraser* (*f*), and the authorities referred to in each of them.)

The LORD CHANCELLOR considered that this was an extremely important case with reference to general principles. An application made to the Court by one of two trustees and executors, who has himself hardly at all acted, without the consent of his acting co-executor,

(*a*) 3 Bro. 233.
(*b*) 2 Atk. 25. 27.
(*c*) 4 Bro. 350. 2 Ves. jun. 199.
(*d*) 14 Ves. 363.
(*e*) 1 Ves. & Bea. 126.
(*f*) 3 Ves. & Bea. 174.

for

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for the taxation of their solicitor's bill of costs, which is alleged to have been long since paid;—after a full settlement of accounts with the *cestuis que trust*, and a release given by them;—this application supported by allegations of gross over-charges;—Whether the solicitor shall be permitted, under such circumstances, to avail himself of the payment by the trustees and subsequent acquiescence, or to say that, by reason of the length of time, he is deprived of the means, which he might otherwise have had, of defending the propriety of the charges which are now called in question? His Lordship said he would look into the affidavits, and give his opinion on the case after full consideration.

August 25.

His Lordship pronounced judgment in this case—when, after recapitulating the principal facts, he said that he should lay the release altogether out of the question as against Mrs. *Lloyd*, she being a feme covert, but that, in any case, he could not have held it as entitled to consideration against the right of a party to have his costs taxed under the statute; and, on the other points in the case, his Lordship held that a solicitor cannot be allowed to interpose the payment of his bill of costs, by a person in the situation of a trustee, between himself and the parties (*cestuis que trust*) for whom he was at the time aware that the person who paid him was no more than a trustee—as, here, an executor acting for the parties beneficially interested under the will.—That the *cestuis que trust*, whose funds were to bear the whole expenses of the suit, had a right to make use of the name of their trustees and executors, (giving them proper indemnity,) to obtain a taxation of the bill;—for, although these trustees and executors would be entitled to retain or be paid any money which they had expended, yet the taxation of a

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solicitor's bill could operate no injury to them, as the solicitor could have no right to demand against them more than would be allowed on taxation.

The application to discharge the order for taxation was consequently refused, but without costs.

August 11.

BENJAMIN MICKLETHWAIT, and MARY his Wife, and Others, - - PLAINTIFFS;

AGAINST

JOHN MOORE, and SARAH his Wife, and Others, DEFENDANTS.

On a bill to set aside a partition, on the ground of inequality, and for a new partition, stating a valuation and estimate, the gross result of which, without the particulars, were contained in a schedule to the bill, the answer denying the accuracy of the valuation, but alleging that the defendant was unable to set forth in what particulars it was inaccurate, by reason of such omission; a motion by the defendant for production of the valuation, and papers, &c. relative thereto, refused with costs.

Where a defendant seeks the production of deeds, &c. stated to be in the plaintiff's possession, the usual course is by filing a cross-bill: but such a case as the present would not, even if a cross-bill were filed, suffice to obtain an order for the purpose.

THE bill was to set aside a partition of estates to which the plaintiffs *Micklethwait* and wife and the defendants *Moore* and wife were entitled, in right of the respective wives, as coparceners, and for a new partition. The grounds upon which the former partition was sought to be set aside were gross inequality in value, and concealment and fraud on the part of the defendants; and the former part of the charge was sought to be supported in the bill, by a statement "that the whole of the estates in question had lately been estimated and valued by Mr. *Thomas Gee*, an eminent land-valuer and commissioner, under acts

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of inclosure; and that the whole of the minerals had been also lately valued by Mr. *Andrew Faulds*, an experienced mineralogist; and from such valuation and estimate, (which was alleged to be a true and accurate valuation and estimate) a summary statement whereof, and also of the valuation of the two lots made previous to the execution of the deed of partition (which was sought to be set aside), the plaintiffs had set forth in a schedule to their bill, it appeared (as it was alleged the fact was), that lot 1. (the share of the defendants) consisted of 213*a*. 2*r*. 38*p*., and was worth 19,915*l*., and that lot 2. (the share of the plaintiffs) consisted of 111*a*. 2*r*. 15*p*. only, and was worth 8003*l*. 5*s*."

The defendants *Moore* and his wife, by their answer, denied the charges of fraud and concealment, and also of inequality of value at the time of the partition, accounting for any present inequality which might exist, from the change of the times operating on the value of different species of property, and from subsequent alterations and improvements in the share of the defendants; and, with regard to the valuations said to have been made by Messrs. *Gee* and *Faulds*, they denied the accuracy of such respective valuations, but said that, in the statement set out in the schedule to the bill, the gross amount of the same only was given, the particulars, annual value, and number of years' purchase, on which the same were calculated, being omitted in the said statement, and therefore they (the defendants) were unable to state in what particular respects the said valuation and statement were incorrect and imperfect.

A motion was now made, on the part of the defendants, "that the plaintiffs might in fourteen days leave with their Clerk in Court the entire valuation

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and estimates of the estates mentioned in the bill to have been made by Mr. *Thomas Gee*, with the observations, remarks, and letters of the said *Thomas Gee* relating thereto, and the entire valuation and estimates of the minerals mentioned in the bill to have been made by Mr. *Andrew Faulds*, with the observations, remarks, and letters of the said *Andrew Faulds* relating thereto, and any instructions given in writing by the plaintiffs or any of them, their or any of their agents or solicitors, to the said *Thomas Gee* and *Andrew Faulds*, or either of them, respecting the same, with liberty for the defendants, their Clerk in Court, agents, or solicitors, to inspect or peruse the same, and to take copies, abstracts, or extracts thereof; and also that the defendants, or any of them, after having inspected and perused the said documents, may be at liberty to amend their answer, or respective answers to the said bill."

Bell and *Harrison*, in support of the motion, referred to *Pract. Reg.* (*a*) Tit. " *Deeds and Writings*," where it is said, " Where a deed in the plaintiff's hands, mentioned in the plaintiff's bill, was necessary to the defendant's making his defence a full answer, the Court ordered the plaintiff should give him a copy of it." In an anonymous case in *Dickens* (*b*), which was an application by a defendant against the plaintiff, (an executor,) for payment into Court of a balance alleged in the bill to be in the hands of the plaintiff, Lord *Thurlow* expressed his surprise, saying, " Did you ever know an instance of a defendant's applying against a plaintiff, *even to produce deeds?* If you want it, you must file a cross-bill for the purpose."

(*a*) Wyatt's Ed. p. 161. But no reference is subjoined.

(*b*) 2 Dick. 778.

However,

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However, in a late case of *Pickering* v. *Rigby* (*a*), which was a suit for an account between the executor of a deceased partner and the surviving partner, the defendant having moved, before answer, for a production and inspection of the partnership accounts, which was resisted on the ground that the defendant ought to have filed a cross-bill, His Lordship, though he refused the motion, suggested that, if the defendant in such a case had put in an answer, stating that the bill called for a discovery which he could not make completely without seeing the partnership books and accounts, the same being in the hands of the plaintiff, it might be possible for him to obtain such an order without filing a cross-bill.

Pepys contrà.

In *Davers* v. *Davers* (*b*), the Court discharged an order which had been obtained by the defendant to inspect a deed proved by the plaintiff in the cause, and referred to by the deposition. In *Wiley* v. *Pistor* (*c*), His Lordship refused a motion by a defendant for inspection of letters referred to by the plaintiff's depositions as exhibits, with costs, observing that such an application must be very familiar, if there were not some objection to it, and he never heard of such a motion. Even a plaintiff, though he has a right to the inspection of deeds admitted to be in the defendant's possession, upon which his own title rests, cannot compel the production of those relating only to the defendant's title, which is independent of his own, as was determined by Lord *Hardwicke* in *Buden* v. *Dore* (*d*). And in *Atkyns* v. *Wright* (*e*), the Court refused

(*a*) 18 Ves. 484.

(*b*) 2 P. Wms. 410.

(*c*) 7 Ves. 411.

(*d*) 2 Ves. 445.

(*e*) 14 Ves. 211. And see *Evans* v. *Richardson*, 1 Swanston's Reports, p. 7. and the references in the note, p. 8.

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refused a motion for a production of deeds and papers referred to as in the defendant's possession, but not described by the answer or schedule, and without an offer to produce them.

The *Lord Chancellor* asked whether the plaintiff by his bill stated the documents in question to be in his possession; and was referred to the statement in the bill already mentioned, which was contended by *Bell* to be equivalent, the valuation being alleged to be made with a view to the present suit for a new partition.

The LORD CHANCELLOR.

The case cited of *Pickering* v. *Rigby* (*a*) is very different from the present. There the bill was for an account of partnership dealings; the plaintiff and defendant were jointly entitled to the possession of the documents, the production of which was the object of the motion; and I then stated that I thought I remembered an instance of an application by a defendant under such circumstances to stay proceedings for want of an answer until he had been assisted with the inspection sought; and that that sort of motion might do without a cross-bill. But this case goes much further than any I have ever yet heard of; and, even if a cross-bill were filed, (which is the usual course,) I should not here be able to compel the production of these documents.

Motion refused with costs.

(*a*) 18 Ves. 484.

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July 28.

PAYNTER *v.* HOUSTON.

THIS was a bill filed by the plaintiffs on behalf of themselves and all other the specialty and simple contract creditors of the testator *James Henry Houston* (deceased) who should come in and contribute, &c. The usual decree was made, whereby it was referred to the Master to take an account of what was due to the plaintiffs and all other the creditors of the said testator; and a motion was now made on behalf of Sir *John Perring*, Bart. and others, bankers, surviving partners of the testator, claiming to be creditors in respect of their dealings as bankers with the testator in his separate business of a merchant, that the Master might be directed to admit them to go in before him and prove their debts under that decree, and to proceed upon such proof, the Master having refused to proceed upon the claim which they had made in respect thereof.

Under the usual decree for an account on a bill by creditors, the Master refused to proceed upon the claim of the surviving partners of the testator, in respect of a debt alleged to be due to them on the balance of certain dealings between the partnership and the testator in his separate capacity: but, on motion to be admitted to go in before the Master and prove this debt under the decree, it was referred to the Master to take the account.

By the affidavit in support of the motion it appeared that the testator, on and previous to the first of *January*, 1810, carried on business as a merchant in partnership with the Honourable *Simon Fraser*, under the firm of *Fraser*, *Houston*, and *Co.*—and that, being so concerned, they (*Fraser* and *Houston*) at the time aforesaid entered into partnership with the claimants (Sir *John Perring* and others) as bankers under the firm of *Simon Fraser*, *Perring*, *Godfrey*, *Shaw*, *Barber*, and *Co.* by virtue of certain partnership articles;—That on the same day the house of *Fraser*, *Houston*, and *Co.* opened two accounts (one called the separate, and the other the general account,) with the banking firm of *Fraser*, *Perring*, *&c.* and that in

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in the course of business the said bankinghouse came under large acceptances for them. That *Simon Fraser*, having died, the business of the mercantile firm was carried on by the testator on his own separate account, but still in the name of *Fraser, Houston*, and Co. and the accounts with the banking-house were carried on in the same manner as before *Fraser*'s death. That, on the 8th of *June*, 1811, partnership articles were entered into between the claimants and the testator, to carry on the business of bankers for fourteen years from *January*, 1811, the interest of any partner who should die during the period of co-partnership not to cease until the 30th of *June*, or 31st of *December*, which should first happen, after the decease of the partner so dying. That in *August* and *October*, 1812, the testator (being then in the individual capacity of a merchant, largely indebted to the bankinghouse,) executed to a trustee for the bankinghouse transfers of several bond and mortgage debts due to him, and in each deed of transfer he (*Houston*) covenanted for the due payment of the debt then owing and all sums that might thereafter become due from him to the bankinghouse; and in *October*, 1813, as a further security executed to the same trustee an assignment of debts due to him from several insolvent persons, and in 1814, also placed in the hands of the said bankinghouse other securities of comparatively small amount. That the testator died on the 12th of *October*, 1814, having made his will and appointed the defendants executors, and being, at the time of his death, indebted to the claimants (as the surviving partners in the bankinghouse) in the balance of both accounts (the separate and general,) to the 31st of *December*, 1814, when his interest as a partner determined. That the partnership accounts of the banking-

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bankinghouse were regularly balanced and made up on the 30th of *June* and 31st of *December* in every year, and the books containing the balance sheets of each year respectively up to the 31st of *December* 1812 were duly signed by the testator, but the testator being in *Scotland* when the partnership accounts for the year ending the 31st of *December* 1813 were balanced and signed by the other partners, the same were not signed by him, although he frequently promised to sign them, and assented to and received his proportion of the profits by a transfer to his account with the bankinghouse; and since his death credit had been given to his account as a partner in the bankinghouse for the full amount of his interest therein.

The affidavit went on to allege that the estate of the testator (as a partner in the bankinghouse) could derive no benefit from the debt owing from him (in his individual capacity as a merchant) to the bankinghouse, even if the latter should get in and receive the whole amount thereof, because the whole debt had always been and still remained credited in the partnership books of the bankinghouse as assets thereof, in the same manner as any other property of the partnership of which they were in actual possession; the same being treated as a good and available debt, and never transferred to the debit of the partnership among such of the outstanding debts as were considered bad or doubtful.

It was further stated that there remained due from the testator's estate in respect of such debts, after giving credit for the full amount of monies received or to be received by the claimants in respect of such securities as were available, and for the value (so far as it could be estimated) of such as were uncertain, the

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sum of 30,000*l.* and upwards, wholly unsecured save by the covenants contained in the above-mentioned deeds of transfer.

Under the decree made in this cause, a charge was on the 26th of *April* 1816 carried in before the Master, supported by affidavit in the usual manner, for so much of the above debt as then remained due, whereby the surviving partners in the bankinghouse claimed to be admitted as specialty-creditors by virtue of the said deeds and securities. The charge was opposed on the part of the plaintiffs, and, after many attendances and much discussion before the Master, was amended at the Master's suggestion, and such amended charge, with an affidavit also in support thereof, left at his office on the 22d of *February* 1817, the solicitor for the plaintiffs having, long previously, inspected all the books belonging to the testator's estate, together with all the securities, in order to ascertain from such inspection the state of accounts; and the affidavit stated that this also took place at the Master's suggestion.

Several attendances afterwards took place on this charge so amended, the last of which attendances was on the 5th of *July*, when the Master said that he did not consider himself authorised to receive the proof of the said debt, on the ground (as it was understood) that the partnership *inter se* formed an objection to the admission of such proof; in other words, that *A. B.* and *C.* surviving partners of *A. B. C.* and *D.*, cannot be admitted to prove a debt in a suit for administering the effects of *D.*

By the application now made to the Court, it was sought on behalf of these claimants to be permitted

mitted to proceed in their charge before the Master, for the sake of avoiding the expence which would necessarily be incurred by their being driven to have recourse to other proceedings in respect of their debt.

Sir S. *Romilly*, *Hart*, *Cooke* and *Horne*, in support of the motion.

Bell and *Wilson*, contrà.

Under this decree the Master can go into no accounts that were not liquidated at the testator's death. He has no power to exhibit interrogatories for the examination of the parties claiming before him. In *Simmons* v. *Gutteridge* (*a*), where leave was given to exhibit an interrogatory for the examination of an executor as to the fact whether he was indebted to the testator, that was permitted upon the ground that the examination of an executor under the usual decree for an account ought to contain such an interrogatory; a debt due by an executor being assets; and the principle was, that this is an interrogatory, not of the party, but of the Master; but it was expressly directed that the interrogatory should be confined to that purpose merely;—not to go into an account, which must be the subject of a distinct bill. The contract in respect of which this debt has accrued, is only available in equity; for at law no man can bind himself, as a partner in one house, to another house in which he is also a partner. *Bosanquet* v. *Wray* (*b*).

Sir *S. Romilly*, in reply.

It is objected that the Master, in this case, has no right to exhibit interrogatories under the decree;

(*a*) 13 Ves. 262. (*b*) 2 Marsh. 319.

but

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but in the case cited in support of this objection the parties resisted the Master's taking the account.— Here they consented, and the Master was actually proceeding to do so when this difficulty suggested itself to him.

The Lord Chancellor.

This question arises under the usual decree for an account of assets in a creditor's suit, upon a demand made by the surviving partners in a bankinghouse in which the testator himself was a partner, claiming to be creditors of their deceased partner in respect of a balance due on his separate account with the partnership. A late decision of a Court of Law has been cited to shew that no *legal* debt can be created in respect of such a transaction. It may be so as it is there stated; but, if that is a right decision, still there is nothing more clear, than that, where an account is decreed, the *equitable* creditors have a right to be satisfied; and that no distribution of assets can take place until the accounts of all the creditors of every description have been gone into. Generally speaking, it is the duty of the Master to meet all the difficulties that may arise in the discharge of this office. In some way or other, he must so provide as that all the accounts, both legal and equitable, shall be fully taken; so that the fact of *Houston*'s having been a partner in the house, however it may alter the nature of his debt, is of no weight at all with reference to the right of the claimants to have their account taken.

Then it is said, the Master is not in a situation to receive the claim, for want of a power to exhibit interrogatories with respect to it. But it strikes me that this never can be the case—that the Court cannot place a creditor in such asituation as that his debt is not to be received.

received. It appears to me that the master is bound to receive such a claim as this. Suppose there had only been a few items on each side to be established, can it be said that the parties must be put to the expense of filing a bill in order to have such an account settled? I think I have seen reports in which the Master has stated that he is not able to ascertain the validity of such claims without the necessity of a bill being filed for the purpose. The principle is the same, although the difficulty may be greater, in the case of an account where the testator was a partner, than in a mere common case of account between parties standing in no such relation to each other. If the Master finds that he cannot go on without an examination of the parties upon interrogatories, and that it is necessary a commission should issue, the parties must apply to the Court for the purpose. The only difficulty in this case is as to the settled accounts — and if, with reference to that, it is necessary to ascertain whether the accounts have been settled or not, either a bill must be filed, or the question submitted to the Court by way of motion upon affidavits.

I apprehend that it is the Master's duty to go on with the accounts until he finds a difficulty arising from the want of sufficient powers; and then an application must be made to the Court, either by the Master or the parties, to do that which is necessary, in order to supply the defect of his authority.

His Lordship concluded by saying that he would speak to the Master on the subject.

An order was afterwards made, by which it was referred to the Master to take an account of the dealings and transactions between the testator, in his own right, and as the surviving partner of the house of *Fraser* and *Houston*, and the bankinghouse in which Sir *John*

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Perring and the other claimants were the then surviving partners, and of what was due on the balances of such accounts to either and which of the parties; and also to take an account of the partnership dealings and transactions as bankers between the said testator and the said bankinghouse, and what was due to or from the said testator on the balance thereof, with liberty to state any matter specially—and, for the better taking the said accounts, the parties were to produce before the Master upon oath all deeds, books, &c. in their custody or power relating thereto, and were to be examined upon interrogatories as the Master should direct, who, in taking the said accounts, was to make unto the parties all just allowances.

March 12.
August 25.

JOHN EDMONDS, - - - PLAINTIFF;
CHRISTOPHER SAVERY, WILLIAM EDMONDS SAVERY, and Others. - DEFENDANTS.

Defendant to an injunction bill, having suffered the injunction to go against him upon a *dedimus*, the time for answering being expired, although not under an order for time, nor in contempt, *quære*, whether he may demur alone; and it seems that he cannot be allowed to do so.

THIS was a motion, on the part of the plaintiff, to take a demurrer, which had been put in by the defendants off the file for irregularity.

The bill was by an heir at law, to have the will of his ancestor, (by which the estate in question was devised to the defendant *Christopher Savery* in trust for his son the defendant *W. E. Savery*,) declared void upon the ground of alleged incompetency in the testator, and for an injunction to restrain proceedings in an action of ejectment, in which the defendants had obtained a verdict, and also from setting up or making any claim to the estates under the said will.

The bill was filed on the 19th of *November* 1816. The defendants appeared on the 22d of the same month, and.

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according to what was stated to be the usual practice in cases of injunction bills, the plaintiff's clerk in Court, on the 5th of *December* following (which was a seal day), applied to the clerk in Court for the defendants, to know upon what ground the plaintiff should take his injunction, —whether upon an attachment, or upon a *dedimus potestatem* to take the answer of the defendants; whereupon the clerk in Court for the defendants gave to the plaintiff's clerk in Court a note signed by the solicitors for the defendants, in these words: "Mr. *Drewe*,—Sir, You will let this injunction go upon the ground least prejudicial to the defendants. What I mean is, that we shall, on account of the great length of the bill, want all the *time* we should be entitled to if this was not an injunction bill. Perhaps you will therefore think the ground should be upon an attachment." To which *Drewe* (who was the agent for the defendants' clerk in Court) had subjoined in his own handwriting, "On a *dedimus*." And, in consequence of this note so delivered, the common injunction was issued on the 10th of *December* (the next seal day after the 5th) in the usual form upon a *dedimus*, which form is as follows.

"Whereas, &c. that *J. E.* hath lately exhibited his bill of complaint against you, the said, &c. defendants, to be relieved touching the matters therein contained, and that you the said defendants, being served with our writ of subpœna commanding you to appear and answer the said bill, have appeared accordingly, *but for delay have craved a commission to answer in the country*, and yet in the mean time, you unjustly (as it is alleged) prosecute the said complainant at law for and touching the matters in the said bill complained of: We, therefore, in consideration of the premises, do strictly enjoin and command you, &c. to desist from all further proceedings at law against the said complainant

 touching

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touching any of the matters in the said bill complained of, until you shall have fully answered the said bill and our said Court make other order to the contrary," &c.

The affidavit of the plaintiff's agent, in support of the application to have the demurrer taken off the file, represented farther that it was the practice of the Court to consider such note as was delivered by the defendants' clerk in Court to be a note praying a *dedimus* to plead, answer, or demur, not demurring alone; that the injunction which had issued had been submitted to by the defendants upon the ground that they had prayed a commission to take their answer in the country; and that, therefore, no process of contempt was issued against them for not putting in their answer to the bill. That, on the 7th of *January* 1817 (being seven weeks after the bill was filed), the defendants filed a general demurrer to the bill, and had not pleaded to or answered any part thereof; and the deponent had been informed, and believed it to be the invariable practice of the Court, to consider a demurrer so filed as irregular, and that, after such note, a defendant was not at liberty to demur alone. (*a*) No order for time had been obtained previous to the filing of the demurrer.

Sir *S. Romilly* and *Wakefield*, in support of the motion to take the demurrer off the file.

Bell and *Pepys*, contrà.

This is a mere question of practice, but of very great importance to the defendants, who are kept out of pos-

(*a*) For the grounds of this demurrer, see *Pemberton* v. *Pemberton*, 13 Ves. 297. *Jones* v. *Jones*, ante p. 161. The objection to the bill was stronger in this case than in either of those cited, there having been two trials at law, and a verdict in one of them.

1 session

session of the estate devised to them by an injunction obtained upon a bill which it is impossible that the plaintiff could support if the demurrer were properly argued.

If the bill had not prayed an injunction, the defendants would, according to the common course, have had till the next term after the bill filed to answer or demur, as he should be advised; and this being upon the principle of convenience and reasonable indulgence, it would be great injustice were the practice to be different, merely because the plaintiff has inserted in his bill a prayer for an injunction, and if, on that account only, the defendant were refused an indulgence which it is thought right to grant in other cases. We admit that, according to the practice of the Court, if, at the expiration of eight days from the filing of the bill, neither an answer nor a demurrer is on the file, the plaintiff is entitled to the common injunction;—that the injunction may be had in either of two ways,—upon an attachment, or upon a *dedimus* to take the defendant's answer;—and that in this case, the defendant, having the option offered him, preferred that it should go upon a *dedimus*. In *The Attorney-General* v. *Henchman* (a), upon a motion to take a demurrer off the file, which had been put in after time for answering was out, but before process of contempt issued, Lord *Thurlow* said that a defendant, until he is affected by process of contempt, may put in a demurrer. To hold that a defendant cannot demur after an injunction has been obtained upon a *dedimus*, would be to decide that, in such a case as this—a country cause, and the defendant not entitled to bespeak an office copy of the bill till after appearance—there can be no demurrer at all; and thus, by adding the prayer for an injunction to a

(a) 3 Bro. C. C. 372.

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bill of discovery, the plaintiff will be enabled to obtain indirectly a discovery of facts upon oath, of which he may afterwards avail himself at law against the defendant, which discovery he has no right to demand according to the principles of equity.

Besides—the *dedimus* upon which the injunction issued, and which is the ordinary *dedimus* returnable without delay, is not the same in point of effect with the *dedimus* which is usually applied for, which is called the *special dedimus*, and is always accompanied with a certain period fixed for the return, whereas in the ordinary *dedimus* there is no limitation in respect of time. See *Hinde*'s Chancery Practice, 229. 243. *Beames*'s Orders, 117, 118. *Wyatt*'s Pract. Reg. 234. This is not such an order as to preclude a demurrer; and it is evident that this was the ground taken in *Elme* v. *Shaw* (*a*)—" Demurrer allowed, but without costs, because it was a demurrer only, without any answer, and came in by commission."

[In order to illustrate the general practice, and the grounds upon which it is founded, the following authorities were also referred to. Orders in Chancery, (*Beames*, 172.) *Penn* v. *Lord Baltimore* (*b*), *Kenrick* v. *Clayton* (*c*), *Taylor* v. *Milner* (*d*).

The LORD CHANCELLOR took time to look into the practice, and just before the Court ended its sittings in the vacation after *Trinity* Term, mentioned the case again (as I have been informed), with the following observations.

This is the case of an injunction bill. The time of answering being expired, the plaintiff's clerk in Court

(*a*) 1 Vern. 282.
(*b*) 1 Dick. 273.
(*c*) 2 Bro. 214. 2 Dick. 685.
(*d*) 10 Ves. 444.

says

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says to the clerk in Court for the defendants, How will you have the injunction go?—upon a *dedimus*, or upon an attachment?—to which the latter answers, "Take it upon a *dedimus*," and it is on this that the question arises, *viz*. Whether, according to the practice of this Court, a party having returned that answer, and the injunction having issued accordingly, can afterwards be admitted to demur alone, It was contended, on the part of the defendants, that he might do so, inasmuch as he would not, in a common case, have been obliged to apply for an order for time until *January*, and, having till that time to put in his defence to the bill, he might intermediately demur. I have made much inquiry into the practice; and, from the best sources that I have been enabled to discover, am bound to state it as my opinion (without at present going into the reasons for that opinion), that, after a party has elected to have an injunction taken against him upon a *dedimus potestatem*, he cannot demur alone. I will give my reasons for it hereafter in the presence of the counsel by whom the question was argued. But, in the mean while, I repeat that I think he is bound by the course he has adopted; for he may proceed to a commission if he pleases.

[I do not hear that the case has been mentioned again, and apprehend that no order has been yet made: but in *Reg. Lib.* A. 1816. fo. 1284. is the following entry. "19 *July*, 1817. Upon motion by Mr. *Wakefield*, of counsel for the plaintiff *Edmonds*, and upon affidavit stating the bill filed, demurrer put in, a cross-bill by the defendant *W. E. Savery*, filed on the 27th of *December* 1816, notice of motion to take the demurrer off the file, the motion made accordingly and counsel heard, that his lordship had not yet declared his judgment thereon, but that the deponent had been informed and believed that the clerks in Court had certified that the demurrer

was

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was irregularly filed; ordered, that the plaintiff *Edmonds* (defendant to the cross-bill) may have six weeks' time to plead, answer, or demur, after the defendants to the original bill shall have answered the same, or the demurrer shall have been allowed."]

ROLLS. *June* 27.

BARKER and Others
v.
The Duke of DEVONSHIRE.

Testator devises to *A.* and *B.* (whom he appoints his executors) upon trust to sell for such purposes as he shall hereafter appoint, and then directs his debts to be paid by his executors.

Under this devise, *A.* and *B.* are authorised to sell for payment of debts.

THOMAS BARKER, by his will, devised all his estate real and personal to the plaintiffs, their heirs, &c., to the use of them (the plaintiffs), their heirs, &c., in trust by application, sale, or mortgage thereof, or of any part thereof, to pay thereout whatsoever he should thereafter by will or codicil appoint. He then appointed the plaintiffs trustees and executors of his will; and proceeded to direct that his just debts, funeral expenses, &c. should be paid by his executors; and devised the residue of his estate and effects (after giving several specific legacies) to his eldest son, provided he lived to attain twenty-one; if not, then to whichever of his sons should first attain twenty-one.

The plaintiffs, under this devise, contracted with the Duke of *Devonshire*, for the sale to him of part of the estates, for the purpose of raising money to pay debts; and they now filed their bill for a specific performance of that agreement: to which the Duke answered that he was advised that, inasmuch as the will did not give to the plaintiffs a sufficient power

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power to sell for payment of debts, and did not provide that their receipt should be a sufficient discharge to a purchaser, therefore he (the defendant) could not safely fulfil his contract, except under the decree of the Court.

The question was, whether this was a devise for the payment of debts generally; for, if so, the trustees might make a good title, without the devisee or heir at law joining; and the purchaser could not be bound to see to the application of the purchase money; it being settled (*a*), that, where the trust is for payment of debts generally, the purchaser is not bound to see to the application.

Benyon and *Heys*, for the plaintiffs.

Cooke and *Abercrombie*, for the defendant, contended that, the direction being for the payment of debts by the executors, this shewed that the intention of the testator was to confine it to payment out of the personal estate.

To this it was replied, that the testator, in using the term executors, only meant to describe those persons whom he had previously appointed as his executors, and to whom he had already given his real estate in trust to sell for such purposes as he should appoint.

The MASTER *of the* ROLLS.

The testator has given his real estate to certain persons, whom he also appoints executors of his will, upon trust to sell for such purposes as he shall afterwards

(*a*) See Sugden, Vend. and Purch. 4th Ed. 413.

appoint;

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appoint; and then directs his debts to be paid by his executors.

In a late case of the same kind (*a*), I held that such a direction authorised a sale for the payment of debts; and I continue of that opinion.

Consequently, a specific performance must be decreed.

(*a*) I have not been able to ascertain the name of this case: but it had occurred recently before the decision of that here reported.

ROLLS. *July* 8.

CHARLES PECHÉ, PLAINTIFF;

AND

CHARLOTTE SMITH, JOHN PECHÉ, and Others, - - - - - - DEFENDANTS.

A grandfather in consideration of a bond from the father to grant him an annuity of 50*l*. during his life, enters into a counter-bond with the father conditioned for payment to the son of a like annuity "in case he was not sufficiently provided for during the life of the grandfather, exclusive of any allowance from his father." The son obtains, through some other interest, a place in the Ordnance office, with a salary exceeding the amount of the annuity.

Held, that this was not a sufficient provision within the meaning of the bond, being an office only during pleasure, whereas the provision in the contemplation of the parties must have been one of a permanent nature.

UNDER a decree by which it was referred to the Master to make certain inquiries, the Master found that *John Peché* (the testator named in the pleadings) made his will dated the 8th of *November*

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1809, whereby he expressed himself to the following effect:—" Whereas I have given my son a bond subject to my will, to direct my executrix or executor hereinafter named to give a power of attorney to receive 50*l.* a year from my long annuities during his life, and should he die without child or children lawfully begotten the said 50*l.* a year to fall into the remainder of my property."—The Master further found that the testator, at the time of making his will, had living one son (the defendant *John Peché*) and a grandson also named *John Peché*, (who was the younger son of the said defendant), and that the testator gave to his son the defendant, a bond, in the penal sum of 500*l.*, the condition whereof, after reciting that the testator had agreed, (in consideration of a bond from his son the defendant, by which he bound himself to pay the testator an annuity of 50*l.* during his life, " in case the said *John Peché* the grandson was not *sufficiently provided for* during the testator's life, exclusive of any allowance from his father,") to give to the said *John Peché* (the grandson) an annuity of 50*l.* during his life, was " that if (the testator) his heirs, executors, &c. should from time to time, &c. during the life of the said *John Peché* (the grandson) pay to the said *John Peché* (the grandson) an annuity of 50*l.* (as therein mentioned) then the bond should be void, or otherwise remain in full force." That the testator had not given any bond to his said grandson: but the defendant *John Peché* gave to the testator a counter-bond in the same penal sum, conditioned for payment to his father of an annuity of 50*l.* during his life. The Master also found that these bonds were given in consequence of some disputes having arisen in the family, when the testator, thinking his grandson harshly treated by the defendant his father, had entered with the defendant into the engagement

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gagement which appeared on the face of the bonds; in pursuance of which the annuity was regularly paid by the defendant to the testator till the day of his death, and the testator also allowed the like annual sum to his grandson.

The cause coming on for further directions upon the Master's report, by an order dated the 27th of *June* 1815, the Court declared that the above-mentioned bequest in the testator's will was meant to be a satisfaction of the bond given by the testator to the defendant *John Peché* for his (the defendant's) son *John Peché*; and it was referred back to the Master to enquire whether the last mentioned *John Peché* had been provided for within the intent and meaning of the bond; with liberty for him to apply to the Court, and further directions.

The Master made his report in pursuance of this order, stating the substance of several affidavits which had been laid before him relative to the appointment of *John Peché* (the grandson) to a place in the ordnance office, with a yearly salary thereto annexed (the amount of which yearly salary was at first 68*l.*, and had subsequently been increased to nearly 200*l. per annum*); and it appeared that this appointment, which had taken place in the life-time of the testator, and before the date of his will, but subsequent to the bonds being executed, was obtained without the interference of his father, the defendant *John Peché*. Under these circumstances, and particularly adverting to the amount of the salary, with reference to the bond, the Master was of opinion that *John Peché* (the grandson) was sufficiently provided for within the intent and meaning of the bond.

The

The report was excepted to, and the exception came on this day to be argued; when *Dowdeswell*, in support of the exception, laid the principal stress on the nature of the office held by the exceptant, which was during pleasure only, and from which he was consequently liable to be discharged at any period.

Sir S. *Romilly* and *Bell*, for the Master's report.

The MASTER *of the* ROLLS held, that a permanent provision must have been meant by the testator, and in the contemplation of both parties to the bond;—that the office in question, though its continuance might become more or less probable, could never be rendered certain, as it must always be subject to the casualties of illness or other incapacity, and consequently was defective in that which he considered as the indispensable requisite of the intended provision. His Honour consequently allowed the exception, and declared that the exceptant was not provided for within the meaning of the bond.

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ROLLS.
July 21, 22.

His Majesty's ATTORNEY GENERAL (at the relation of JOHN LEE MARTYN, Clerk), INFORMANT;

AND

GEORGE GROTE, - - - DEFENDANT.

Testatrix gives to the minister, &c. of *A.* 5*l.* *per annum* Bank long annuities; to the minister, &c. of *B.* 5*l.* *per annum* like Bank annuities; to the treasurer of *C.* and *D.* 100*l.* long annuities stock, each; to the governors of *E.* 100*l.* long annuities stock; and "30*l.* *per annum*, further part of my Bank long annuities," upon trust to apply the interest and dividends to and for the use of *L. D.* till she attains 21, and then to transfer "the said 30*l. per annum* Bank long annuities" to the said *L. D.*—She then gives to *W. C.* 150*l.* Bank long annuities stock, and 10*l. per annum* "further part of my long annuities," in trust for *H. G.*—By a codicil, reciting, "Whereas I may have made a wrong calculation of the value of my fortune in the funds at the time of my decease," she directs that in case of deficiency, it may be deducted out of the residue, as she would have all her legacies paid to the full.

The testatrix was at the time of her death possessed of only 385*l.* long annuities, and her personal estate was insufficient to pay her debts. Upon a question whether the treasurer of *C.* was entitled to a legacy of 100*l.* long annuities stock, or only to 100*l.* to be raised by the sale of stock to that amount, *Held*, that it was a specific legacy of so much stock, and decreed accordingly.

"Will not to be construed by something *dehors*, as by the state of the property, where no latent ambiguity."

THE Information stated that *Letitia Pitts* being possessed of a considerable personal estate, and (amongst other things) of monies in the public stocks, and in particular of long annuities to the amount of about 400*l.* a year, duly made her last will dated the 30th of *December* 1805, whereby, after appointing certain persons to be trustees of her will, she proceeded to the effect following:—"I give and bequeath to the minister and churchwardens of the parish of *Great Brick Hill* in the county of *Bucks* 5*l.* *per annum* Bank long annuities, and I give to the minister

and

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and churchwardens of the parish of *Wargrave* 5*l. per annum* like Bank annuities, in trust for the poor of their respective parishes, and to be laid out for them in bread or meat every half-year when and as the dividends or yearly proceeds thereof shall become due and payable; and I give and bequeath to the treasurer for the time being of *Saint Bartholomew*'s Hospital in *London*, and to the treasurer for the time being of the *Foundling* Hospital near *Queen Square, London*, 100*l.* long annuities stock, each, to be applied for the use and benefit of the said respective hospitals; and I give to the Governors for the time being of the Charity School of *Saint George the Martyr, Queen Square*, 100*l.* long annuities stock, to be applied for the use and benefit of that charity. I give and bequeath 30*l. per annum*, further part of my Bank long annuities, in trust to receive and apply the dividends and yearly proceeds thereof to and for the use of *Letitia Deighton*, spinster, until she attain her age of twenty-one years, and, when and so soon as she shall attain that age, then upon trust to transfer the said 30*l. per annum* Bank long annuities unto the said *Letitia Deighton* to and for her own use and benefit; but in case the said *Letitia Deighton* should depart this life before she attains her said age of twenty-one years, then upon trust that my said trustees or the survivor of them do and shall transfer the said sum of 30*l. per annum* Bank long annuities unto the said Mr. *William Culverden*, his executors and administrators, to and for his and their own use and benefit; and I give unto the before-named Mr. *W. Culverden* 150*l.* Bank long annuities stock, and I give Mrs. *Culverden* 20*l.* for mourning; and I also give and bequeath 10*l. per annum*, further part of my Bank long annuities, in trust to pay the dividends and yearly proceeds thereof to Mrs. *Hannah Gearing* (who lived

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lived in my service many years) and her assigns, for and during the term of her life; and I desire that all my legacies, debts, and funeral expenses may be paid within one month after my decease, or bear interest at 5*l.* *per cent per annum* after that time, until they are discharged." That the testatrix afterwards made the following codicil to her will: "And I give and bequeath to Mr. *William Culverden* a further sum of 100*l.*, I have before bequeathed him in my will. And whereas I may have made a wrong calculation of the value of my fortune in the funds at the uncertain price they may be at the time of my decease, I will and direct that, if there should be any deficiency, it may be deducted out of the residue of my personal estate, as I would have all the legacies and bequests paid to the full."

The information, filed at the relation of the treasurer of the Charity School of *St. George the Martyr*, claimed on behalf of the charity a legacy of 100*l.* long annuities stock.

The defendant *Grote* (who had taken out administration, with the will annexed) by his answer, stated that the testatrix was at the time of her death possessed of 385*l.* *per annum* Bank long annuities, but to no other monies in any of the public funds; and that, exclusive of the said long annuities, the personal estate was by no means sufficient to satisfy her funeral and testamentary expenses and debts. He submitted that, according to the true construction of the will, and under the circumstances aforesaid, such legacy was not to be considered as a specific bequest of 100*l.* *per annum* long annuities, part of the long annuities standing in the name of the said testatrix at the time of her death, but that the charity was entitled to so much only of the said

said stock as by a sale thereof would raise the sum of 100*l.*

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Bell and *Roupell*, for the information.

Hart and *Palmer*, for the defendants, cited *Kirby* v. *Potter* (*a*), and *Fonnereau* v. *Points*. (*b*)

The MASTER *of the* ROLLS.

There can be no doubt that, if the testatrix had given a single legacy of "100*l.* long annuities stock," the legatee would have been entitled to a long annuity of that yearly amount. But a doubt is raised, partly from the circumstance that she had not stock enough to answer all the legacies she had given in these terms, if they are considered as annuities, and partly from her having in other instances specified her legacies as consisting of so much *per annum* in Bank long annuities. These circumstances do, I admit, create a doubt whether the testatrix meant to give 100*l.* *per annum* when she has not expressly said so. But if she did not mean that, I am greatly at a loss to say what it was that she did mean. For it is hardly conceivable that any person intending merely to give 100*l.* in money should use the words "long annuities stock."

In *Fonnereau* v. *Points* (*b*) Lord *Thurlow* was struck with the enormous disproportion between the stock the testatrix had, and what, by the construction which was contended for, she must have been taken to have given; the latter being ten times as much as the former. In a case precisely the same, I might be disposed to follow that precedent, although, even there, it was not without great difficulty that the Court was prevailed upon to ad-

(*a*) 4 Ves. 748.
(*b*) 1 Bro. 472. And see *Page* v. *Leapingwell*, 18 Ves. 463.

mit

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mit the extrinsic evidence as to the state of the property, in order to explain the intention of the testatrix. In this case, there is not nearly such a disproportion; and the testatrix appears to have herself entertained some apprehension that she had given more than her funded property would be sufficient to satisfy. It is true that her doubt is founded on the uncertainty of the price of the funds. And upon that it is fairly enough observed that if she had throughout given portions of stock, the price of the funds would be wholly immaterial. But, on the other hand, the apprehension was absurd, if she meant gross sums of 100*l.*, instead of 100*l. per annum.* For a single 100*l.* of her long annuities would have been much more than sufficient, at the lowest price of them, to pay all her legacies, if considered merely as pecuniary.

With regard to her having used different expressions in her different bequests, the whole will is too inaccurately worded to admit of any certain inference being drawn from that diversity. There was a case before Lord *Thurlow*, of *Stafford* v. *Horton* (*a*), in which the same variation of expression occurred. The testator gave to his daughter 100*l. a-year* long annuities, to the plaintiff 50*l.* long annuities, and to another person 50*l.* long annuities, to be laid out in charity at his discretion; and Lord *Thurlow* held all the legacies to be specific, and directed a transfer of so much long annuities. In *Fonnereau* v. *Pointz*, there was some ground for holding the legacies to be of money, and not of stock, from the expression "*the sum* of—stock" used in each of them. And in the ultimate judgment stress was laid on other peculiarities of expression which do not occur here.

(*a*) 1 Bro. 482.

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Under these circumstances, the question comes round to this:—whether, as the words used are properly descriptive of so much stock of Bank long annuities, it appears, as (Lord *Thurlow* thought it did in *Fonnereau* v. *Pointz*,) "perfectly clear, from other circumstances, which amount to demonstration, that the testatrix did not mean them in that sense?" I think it does not; and that therefore I am not warranted in striking out, or leaving inoperative, the words "long annuities stock." To authorise a departure from the words of a will, it is not enough to doubt whether they were used in the sense which they properly bear. The Court ought to be quite satisfied that they were used in a different sense, and ought to be able distinctly to say what the sense is in which they were meant to be used. A legacy of 100*l.* is a different thing from a legacy of 100*l.* stock. The testatrix has expressly given "100*l.* long annuities stock:" but I am desired to hold that she meant 100*l.* in money, or such a portion of stock as would be equivalent to 100*l.* in money. I do not say it is not doubtful whether she may not have meant this;—but there is not enough to shew clearly that it is what she did mean. I must therefore abide by the words of the will, and decree accordingly.

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July 30.
August 1. 8.

WILLIAM DIXON, JAMES MOFFAT, and JAMES DIXON, - - - PLAINTIFFS:
WILLIAM EWART, WILLIAM TAYLOR, MYERS, MATHER, TOBIN, BAYLEY, RITCHIE, and MOFFAT, - - DEFENDANTS.

The bill of sale passes the absolute property in a ship at sea, subject only to be divested in case of the indorsement on the certificate of registry not being made within ten days after the return of the ship to port.

Power of attorney to sign an indorsement on the certificate, not revoked by bankruptcy of the vendor subsequent to the execution of the power, but previous to the indorsement; being a power only to do a mere formal act, which the bankrupt himself might have been compelled to execute notwithstanding his bankruptcy, and for a valuable consideration.

Therefore in this case, the indorsement on the certificate being made within the ten days under a power of attorney, the grantor of which had since become bankrupt: Held a sufficient compliance with the terms of the Registry act.

THE defendants *Ritchie* and *Moffat*, carrying on business as merchants at *Liverpool* under the firm of *Ritchie* and Co., applied in 1814 to the defendants *Ewart* and others, brokers, (in partnership under the firm of *Ewart, Rutson,* and Co.,) for advances in money to the extent of 10,000*l*, on the security of goods, the property of *Ritchie* and Co., then in the hands of them the said *Ewart, Rutson,* and Co., to which they consented, on *Ritchie* and Co. procuring sufficient securities for the amount of any deficiency that might happen. *Ritchie* and Co. then applied to the plaintiffs, (who were also merchants and partners at *Liverpool*,) and requested them to become such sureties, upon a representation that the goods in the hands of *Ewart, Rutson,* and Co. were much more than sufficient in value to cover the whole amount of the proposed advances; and the plaintiffs, confiding in such representations, agreed, (together with another house of *Grays, Wilson,* and Co.)

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to become sureties accordingly: and immediately afterwards, in pursuance of an arrangement made for the convenience of *Ewart*, *Rutson*, and Co., *Ritchie* and Co. drew bills of exchange, dated the 28th of *September* 1814, and made payable three months after date, to the amount of the advances agreed upon; which bills were afterwards renewed from time to time, on the sole guarantee of the plaintiffs, to *September* 1815, when 2500*l.* (part thereof) was paid off, and the remaining bills were still further renewed to the 6th of *March* 1816.

In *December* 1815, *Ritchie* and Co. applied to *Ewart*, *Rutson*, and Co. for a further advance of 30,000*l.*, which they also agreed to make on condition that the payment thereof, and of all other sums advanced or to be advanced to them as aforesaid, (including the 7500*l.* then remaining due on the said bills of exchange,) should be secured to them on certain ships, the property of *Ritchie* and Co., which they had sent to the *West Indies*, and the cargoes and proceeds thereof. The advance of 30,000*l.* was made accordingly, at different times, from *December* 1815 to *March* 1816; and (among other securities for the repayment which were entered into in pursuance of the agreement between the parties) bills of sale of the ships were regularly executed by *Ritchie* and Co. to *Ewart*, *Rutson*, and Co.; with powers of attorney, enabling certain persons therein named, jointly or separately, to sign an instrument on the certificate of registry of each ship within ten days next after its arrival at the port of *Liverpool*, or any other port or ports in *Great Britain*, notifying the transfer thereof to *Ewart*, *Rutson*, and Co., according to the form of the statutes. Copies of these bills of sale were within due time delivered, and entries thereof indorsed on the affidavits of the certificates and memoranda made in the book of registers, and notice given to the commissioners

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of customs, in every respect conformably with the provisions of the registry acts for the effectual transfer of ships at sea; and by an indenture of defeasance, bearing even date therewith, after reciting the circumstances of the transactions and the agreement between the parties, it was witnessed that the assignments and transfers of the said ships so made as aforesaid were upon trust (if the said *Ewart*, *Rutson*, and Co. should not in the mean time be otherwise satisfied the amount of their advances) upon the arrival of the said ships, or of any of them, in any port or ports of *Great Britain* or *Ireland*, upon giving seven days' notice in writing to the owners, to make sale and dispose thereof in such manner as to them (the said *Ewart*, *Rutson*, and Co.) should seem meet, and to apply the money arising from such sale or sales, in the first place, in payment of the expenses of the said assignments and taking possession, and of making and completing the indorsements on the certificates of registry thereof, and of any actions or other proceedings to be brought or instituted relative thereto; and of reasonable commission, &c.; then to reimburse themselves the amount of their advances made or to be made as aforesaid, and all other charges and expenses; and lastly, to pay over the surplus to *Ritchie* and Co., or as they should appoint. After these bills of sale and other securities had been completed, and on being informed thereof, the plaintiffs agreed to a still further renewal, understanding that they were to have the protection of these new transactions. Upon the arrival in *England* of the several ships so assigned, *Ewart*, *Rutson*, and Co. took immediate possession; and, within ten days after their respective arrivals, caused the proper indorsements to be made, notifying the transfers upon the affidavits of the certificates signed by some or one of the persons legally authorised by virtue of the powers of attorney. They afterwards sold the ships and received the produce.

produce. On the 19th of *August* 1816, previous to the indorsement being made on the certificates, *Ritchie* and Co. became bankrupts, and the defendants *Mather*, *Tobin*, and *Bayley*, were appointed their assignees. An action was afterwards commenced by *Ewart*, *Rutson*, and Co., against the plaintiffs as indorsers of the bills of exchange, and the present bill was filed to stay proceedings in such actions, praying that the plaintiffs might be declared entitled to the benefit of all the securities to the extent of the bills, and that the same might be delivered up to be cancelled; or, in case the defendants *Ewart* and Co. should not admit assets arising from the several securities so sold by them to cover the amount of advances, then for an account, &c.; and, if necessary, that an issue might be directed to try whether *Ritchie* and *Moffat*, or either of them, had by any act of their own made the property assigned by them to *Ewart* and Co., and the proceeds thereof, liable to the payment of the bills so indorsed by the plaintiffs.

Upon a motion being now made for a perpetual injunction according to the prayer of the bill, the principal question, *viz.* whether the bills of exchange, so drawn by *Ritchie* and Co., and indorsed by *Ewart* and Co. to the plaintiffs, for the accommodation of, and as sureties for, *Ritchie* and Co., had not in fact been satisfied, and the plaintiffs become exonerated from their liability as indorsers (*a*), appears to have been

(*a*) "A surety is entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have these securities transferred to him, though there was no stipulation

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been considered as too clearly in favour of the plaintiffs to admit of argument. But another question was raised by the answer of the assignees,—*viz.* whether a valid indorsement on the certificate of registry upon the transfer of a ship can be made by a person duly constituted for that purpose by power of attorney, the power of attorney being executed before, but the indorsement executed not till after, an act of bankruptcy committed by the vendor and a commission issued:—in other words, whether the power is not revoked by the bankruptcy?—and this question now came on to be argued.

The provision of the last registry act relative to the indorsement on the certificate, is as follows.

"That if any ship or vessel shall be at sea, or absent from the port to which she belongs, at the time when any alteration in the property thereof shall be made, so that an indorsement on the certificate cannot be immediately made, the sale, or contract or agreement for the sale, thereof shall, notwithstanding, be made by a bill of sale or other instrument in writing as before directed, and a copy of such bill of sale or other instrument in writing shall be delivered, and an entry thereof shall be indorsed on the oath or affidavit, and a memorandum thereof shall be made in the book of registers, and notice of the same shall be given to the commissioners of the customs in the manner thereinbefore directed, and, within ten days after such ship or vessel shall return to the port to which she belongs an indorsement shall be made and signed by the owner or owners, or some person legally authorised for that purpose by him, her, or them,

stipulation for it; and to avail himself of all these securities against the debtor."

See *Craythorne* v. *Swinburne*, 14 Ves. 162.

and

and a copy thereof shall be delivered in manner therein-before mentioned: otherwise such bill of sale, or contract or agreement for sale thereof, shall be utterly null and void, to all intents and purposes whatsoever, and entry thereof shall be indorsed, and a memorandum thereof made, in the manner hereinbefore directed." (*a*)

Leach, for the assignees.

The single question now before the Court is, whether this power of attorney was revoked by the bankruptcy? In point of fact, no interest passes under the assignment until its completion by the indorsement on the certificate; and, admitting that, if the owner of the ship had not become bankrupt, he could not have revoked the power which he had given, that has nothing to do with the present case, which turns solely on the policy of the registry acts, and is to be decided by a strict attention to the provisions of those acts.

Generally speaking, a power of attorney is determinable and revocable at pleasure; and it is immaterial in what terms it is expressed in the instrument which passes it. But this general way of stating the proposition is subject to qualification in cases where the power is given for a valuable consideration, or, in other words, where an act has been done, by which the owner of property is converted into a trustee, but there remains some formality to complete it, and a Court of Equity would compel the performance. Generally speaking, also, such a power is revoked by bankruptcy. *Hovill* v. *Lethwaite* (*b*), *Watson* v. *King* (*c*)—and that even in cases where the power is coupled with interest;

(*a*) 34 Geo. 3. c. 68. s. 16.

(*b*) 5 Esp. Rep. 158.

(*c*) 4 Campb. 272. See *Abbott* on Shipping, 77.

although

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although I allow that this also admits of qualification; and that here also the true question is, whether the bankrupt himself could have been compelled to do the act required, if he had not been a bankrupt; because, if that is to be decided in the affirmative, then are his assignees equally compellable with himself; and, *vice versâ*, if the bankrupt would not himself have been compellable to make the indorsement on the certificate, so neither can his assignees be compelled to make it.

Now, if I have stated the point in this case correctly, it is one which really does not admit of argument, the law on the subject being perfectly established by the cases which have been decided. It is a question entirely surrounded by authority. A Court of Equity has not, by the policy of the registry acts, any power to aid a defective conveyance, or to compel the performance of that which rests upon covenant. *Hibbert* v. *Rolleston* (*a*), followed by *Mestaer* v. *Gillespie*. (*b*) The only cases in which this point can be considered as having been left at all doubtful are those of fraud; and even in such cases the Master of the Rolls (*Grant*) has expressed a strong opinion against the Court's interference. *Speldt* v. *Lechmere*. (*c*)—And later cases appear to have gone the full extent of denying it. (*d*) Without denying, therefore, that, if the power of attorney had remained unrevoked when the ship arrived in port, the subsequent bankruptcy of the vendor would not have operated as a revocation; in this case the party had no longer any power when the ship arrived, and the subsequent act is, therefore, a mere nullity.

(*a*) 3 Bro. C. C. 571.

(*b*) 11 Ves. 625. 642.

(*c*) 13 Ves. 588.

(*d*) See *Ex parte Yallop*, 15 Ves. 60. *Thompson* v. *Leake*, 1 Madd. 39. and cases referred to in *Thompson* v. *Smith*, ib. note, p. 399. *Brewster* v. *Clarke*, ante, Vol. II. p. 75.

Sir S. *Romilly*, *Bell*, and *Spence*, contrà.

Admitting these cases to have established the point contended for, they do not apply to this, where there has been an indorsement actually made, and the only question is, whether it has been made by persons properly authorized. Enough has been conceded to us in the admission that this was a power of attorney of such a nature as not to be revocable either by the act of the party or by bankruptcy, being given for a valuable consideration, and in order to effectuate a conveyance which had been actually made. It is clear that, in any other case, where these acts of parliament do not operate, the Court would compel the execution of the only requisite remaining to perfect it. Then what alteration do the statutes make in such a case as the present? All the penalties required by the statutes have been complied with. What object of public policy can remain unfulfilled, when an attorney has been properly constituted to do the act required? It is not a case resting on covenant, but the actual completion of the conveyance, so far as it was possible that it should be completed. Did the bankrupt, by executing the bill of sale, and complying with all the requisites of the statute, so far as they could have been complied with, divest himself of the property, so that no interest in it remained to pass to his assignees? That is the true question, and it is a question which can only admit of one answer. The bankruptcy of the party revokes a power of attorney given by him, only in cases where no estate or interest passes previous to the execution of the power. What is the reason assigned by Lord *Coke*, why a power of attorney to deliver seisin is countermanded by the death, not only of the feoffor, but of the feoffee also, and the deed itself thereby "becomes of none effect?" "Because in this case, nothing doth passe before livery of seisin; for, if the feoffor dieth, the land descends to his

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his heire, and, if the feoffee dieth, livery cannot be made to his heire, because then he should take by purchase where heires were named by way of limitation." (*a*)

The cases cited from *Espinasse* and *Campbell* were of powers for sale and for the receipt of money, giving a lien, but no actual conveyance, and so not at all applicable to the present question. But it has in fact been already decided by the Court of King's Bench, in a very late case, *Palmer* v. *Moxon* (*b*), in which the cases of *Moss* v. *Charnock* (*c*) and *Hubbard* v. *Johnstone* (*d*) were fully discussed, and the principle was established, that the property in a ship passes instantly by the bill of sale; — that it is divested, subject only to be revested if the provisions of the statutes are not complied with. Now, what are those requisites provided by the statutes? The act of King *William* (*e*) provides that, "in case there be any alteration of property in the same port, by the sale of one or more shares in any ship after registering thereof, such sale shall always be *acknowledged* by indorsement on the certificate of register, before two witnesses, *in order to prove that the entire property* in such ship remains in *some of the subjects of England*, if any dispute arises concerning the same. And the effect of the indorsement is not altered by any of the subsequent statutes; the last of them (*f*) referring to the laws then in force (among which is this act of King *William*) enacting that, if any ship shall be at sea, &c. at the time when such alteration in the property thereof shall be made "*as aforesaid*, &c." the sale or contract for sale shall, notwithstanding, be by bill

(*a*) Co. Litt. 52. b.

(*b*) 2 Maule and Sel. 43.

(*c*) 2 East, 399.

(*d*) 3 Taunt. 208.; and see *Ritchie* v. *St. Barbe*, 4 Taunt. 768.

(*e*) 7 & 8 W. 3. c. 22. s. 21.

(*f*) 34 Geo. 3. c. 68. s. 16.

bill of sale, &c. and an indorsement made within ten days after her return, and a copy thereof delivered "in manner hereinbefore mentioned," &c.—evidently pointing at no alteration in the effect of the indorsement, but merely extending it to the case which was meant to be provided for, of a ship at sea.

Upon the whole, this was only a power to do that which the bankrupts might have been compelled to do, and might still do, notwithstanding their bankruptcy,—a mere formal act for the completion of a title, which is already perfect, to the extent of divesting out of the bankruptcy the entire property in the ship, and for which they have received a valuable consideration. (*a*)

Leach in reply.

The principle laid down by *Coke* unquestionably governs the case: but the question still remains, whether the indorsement is not an act necessary to perfect the conveyance—whether it is not the same in effect as the livery of seisin, which is essential to pass an interest in land, and to complete the feoffment. The material principle of the policy of the navigation laws is, that the name of the true owner shall appear on the documents evidencing the property of the ship; and, until that is effected by the indorsement being actually made, the property remains where it was, notwithstanding the deed of transfer. The indorsement is the substantial act—the mode in which, and in which only, the statutes declare that a transfer can be effectually made. *Palmer* v. *Moxon* decides nothing as to this. The whole argument in that case proceeded upon the principle of relation to the time required by the statute, and, by excluding the present question, actually establishes the contrary conclusion to that which is contended for.

(*a*) See *Lemprière* v. *Pasley*, 2 T. R. 485.

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The case therefore returns to the original question,—whether the bankrupt could himself have been compelled to execute the indorsement,—or whether he could execute it, if no power of attorney had been given, notwithstanding his bankruptcy. The case is very material upon general principle; and the point has no where been decided.

The LORD CHANCELLOR.

I am glad to have been referred to the case of *Palmer* v. *Moxon;* for I thought something had been said on this subject in the courts of law since *Moss* v. *Charnock*, upon which I formerly observed in *Mestaer* v. *Gillespie.* (*a*) It strikes me very forcibly that the principle must be similar to that of the cases under the annuity act (*b*), by which it has been decided that the grant of the annuity passes the ownership instantly, subject to be divested in case of non-compliance with the provisions of the act by inrolment within the twenty days thereby limited; and this appears to be Lord *Ellenborough*'s opinion in *Palmer* v. *Moxon;* for I cannot think that the decision of the Court of King's Bench in that case can be satisfactorily accounted for by the doctrine of relation. The ship might have been taken in execution within the ten days; but property must be in actual possession when execution is executed; and, therefore, if the property were not passed by the bill of sale, there could be no valid execution. There is no doubt that there can be no such thing as an equitable title to a ship; and the case before the Vice-Chancellor (*c*) is, as to this, also very material. When the former act (*d*) passed, there was not sufficient attention paid, in framing its enactments, to what might be its effect upon the principles adopted in

(*a*) 11 Ves. 637.

(*b*) 17 Geo. 3. c. 26.

(*c*) *Thompson* v. *Smith*, 1 Madd. 395.

(*d*) 26 Geo. 3. c. 60.

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Courts of Equity; and it was to remedy that deficiency that the last act was introduced (*a*), by which it is now completely established that there can be no such thing as the equitable ownership of a ship. I well know that a bill does not lie to compel the execution of the indorsement after the ten days are expired: but, if it were possible for him to bring his case before the Court within the time limited, would the Court refuse to entertain it?—or, if the legislature had given twelve months instead of ten days, would the Court refuse to aid the party in such a case by the exercise of its jurisdiction to compel the specific performance of an agreement? I cannot imagine that the legislature meant to declare that there may be a sale of a ship at sea, but that there shall be no means, either at law or in equity, of compelling the execution of those formalities which it has directed to accompany the transfer. The legislature could not have meant to deny to the suitor, in such a case, the advantage of equitable relief. Its meaning must have been, to give the party an inchoate right to the property which is the subject of the assignment.

The LORD CHANCELLOR. *August* 8.

When this case was before me, I considered that there are some important points of law which will be involved in its decision, and resolved, before I did any thing further, to have the opinion of some of the judges upon these questions. I have since received from Mr. Justice *Abbott*, now on the circuit, a note containing the opinion of himself and the Lord Chief Justice of the Common Pleas, which is, in substance, that the transfer of a ship at sea, if all the requisites of the registry acts

(*a*) 34 Geo. 3. c. 68.

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have been duly complied with at the time of the transfer, vests the property in the vendee, subject only to be divested upon the neglect of the vendor to make the indorsement on the certificate of registry within the ten days after the return of the ship into port. That, if a bankruptcy intervenes before the arrival of the ship, the indorsement, being only an act of duty on the part of the vendor, and passing no interest, may be performed by the bankrupt himself. And that (as in this case) if the vendor has given a power of attorney to perform this act of duty previous to the bankruptcy, his attorney may carry it into effect notwithstanding the act of bankruptcy has intermediately occurred.

This is the opinion which these judges have given; and on the authority of their communication I shall act as if it were the settled law of the case, which indeed, upon looking into the acts of parliament, and considering the opinion delivered to me, I think that it is. But, if any of the parties should think otherwise, and should choose, after this, to have a case for the decision of a court of law, I will give it them.

The injunction accordingly issued.

JAMES SKEY, the Younger, - PLAINTIFF;
AGAINST
THOMAS BARNES, MARY SKEY, GEORGE SKEY, and JAMES SKEY, the Elder, DEFENDANTS.

ROLLS. *December*, 1816.

Testator gives his personal estate to trustees, upon trust to pay the interest to his daughter *E. S.* for her life, and, after her decease, to pay and divide the principal among the children of his said daughter, and the issue of a deceased child, as she should appoint, and in default of appointment to go to and be equally divided among them; and if but one, then to such only child; the portions of sons to be paid at their respective ages of twenty-one, and of daughters at their respective ages of twenty-one, or marriage. If no issue, or all die before their respective portions become payable, then over.

The shares are so given as to vest immediately in the children of *E. S.*, though liable to be divested by all dying under twenty-one, without issue.

The share of a child so dying was therefore held to pass to its representative.

JOHN BROCKHURST by his will devised his real estates to the defendant *Barnes* and another (whom he also appointed executors of his will) and their heirs, during the life of his daughter *Eleanor* (wife of the defendant *James Skey*) upon trust, during her life, to pay the rents and profits to her separate use; with remainder to the use of her first and other sons in tail-male; in default of such issue to the use of all and every her daughters as tenants in common in tail with cross-remainders; and for default of such issue to the use of his nephew *Thomas Brockhurst* in fee. He also gave and bequeathed to his said trustees, their executors, &c. all his personal estate and effects, in trust to sell, and invest the produce on real or government securities, and to pay the interest to his daughter *Eleanor* during her life for her separate use; and after her decease, "to "pay and divide the whole of the said trust monies to "and amongst all and every the child or children of "the body of my said daughter lawfully to be begotten "and the lawful issue of a deceased child," in such proportions as his said daughter should by will appoint;

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and in default of appointment then the same "to go to "and be equally divided between them share and share "alike, and if there should be but one child, then to "such only child; the portion or portions, parts or "shares of such of them as shall be a son or sons to be "paid at his or their respective ages of twenty-one, and "the portion or portions of such of them as shall be a "daughter or daughters to be paid at her or their re-"spective ages of twenty-one or days of marriage first "happening: but, in case there shall be no such issue "of the body of my said daughter, or all such issue "shall die without issue, before his or their respective "portions should become payable as aforesaid," then 1000*l.* for his sister *Mary* and her family, as therein mentioned; and, as to 1500*l.*, for his niece *Ann Wells* and her family, in like manner; and in case there should be no issue of either, for his said nephew *Thomas Brockhurst*, whom he also made his residuary legatee. The will contained a proviso that it should be lawful for the trustees, &c. to pay and apply the interest of the respective children's portions towards their education and maintenance until their respective portions should become payable.

The testator died after making his will, leaving the said *Eleanor Skey*, his only child, who received the interest, &c. of the personal estate for her life, and died on the 18th of *December* 1794, intestate, and having made no appointment, leaving the defendant *James Skey*, (her husband), the plaintiff (her son), the defendant *Mary Skey*, and *Frances*, *Sarah*, and *Elizabeth Skey*, (all since dead) her daughters, her surviving; of whom *Elizabeth* died in *January* 1811, under twenty-one, unmarried, and intestate; *Sarah* died in *October* 1811, having attained 21, and having by her last will appointed the defendants *George Skey*, and *Mary* (her sister),

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sister), executor and executrix and *Frances* died in 1813, intestate and unmarried, but having attained twenty-one. Administration, both to *Elizabeth* and *Frances*, was taken out by the defendant *James Skey*, their father.

The question was as to the share of *Elizabeth* (who had died under twenty-one and unmarried,) to which the plaintiff claimed to be entitled, together with the defendant *Mary* and the representatives of *Sarah* and *Frances*, respectively, by right of survivorship.

The defendant *James Skey* (the father) on the contrary, insisted that the share of *Elizabeth* was a vested interest, transmissible to her personal representatives, and he claimed to be entitled to it by having taken out administration.

Hart, *Bell*, and *Dowdeswell*, for the plaintiff.

A general rule of construction, relative to the vesting of legacies, is that, "when a legacy is given to *A. to be* "*paid*, or *payable*, at a given period, the legacy will be "considered as vested immediately, although not to be "paid until the period assigned, as *debitum in præsenti*, "*solvendum in futuro*; the time being annexed to the "payment only, and not to the legacy itself." (*a*) But, "when the time appointed for payment of a legacy is "annexed to the very substance of the gift," as a gift to *A.* "*at*, or *if*, or *when*, or *provided* he attains twenty-one," the legacy will not vest in such cases before the arrival of the prescribed period. And, wherever the will necessarily requires a different construction, so as to give it effect, the rule will yield to such necessary construction.

(*a*) 1 Roper on Legacies, 151. referring to *Jackson* v. *Jackson*, 1 Ves. 217. *Bolger* v. *Mackell*, 5 Ves. 509, &c.

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struction. *Scott* v. *Bargeman* (*a*), *Mackell* v. *Winter* (*b*), *Worlidge* v. *Churchill* (*c*), Anon. *Dyer*, 303. Upon the whole context of this will, it is evident that it was intended the shares should not vest till twenty-one; but that, in the event of the death of any under that age, the others should take by survivorship. If there should be but one child, the whole was to go to that child. The limitations over are only in the event of *all* dying under twenty-one, or (if daughters) unmarried. The gift, and the time of payment, are clearly annexed to each other. The shares are given to trustees, until they respectively become payable, with a discretionary power of applying the interest of the respective shares towards the education, or maintenance, or other benefit, or advantage, of the several legatees, until their respective portions should become payable, subject to the said contingencies of his daughter dying and leaving no children,

(*a*) 2 P. W. 69. "One having a wife and three daughters devises to his wife, upon condition that she would pay 900*l.* into the hands of *J. S.* in trust to lay out at interest, and pay the interest to his wife during widowhood, and after her death or second marriage in trust to divide the same equally among the three daughters *at their respective ages of twenty-one or marriage;* provided that if all his three daughters, should die before their legacies should become payable, the mother should have the 900*l.* The wife married again. The two eldest daughters died under twenty-one, and unmarried. The third attained twenty-one; and the question being whether she was entitled to all, or what part of the 900*l.*, the Lord Chancellor (*Macclesfield*) held she was entitled to the whole, because (according to the report) the shares did not vest absolutely in any of the daughters under age, in regard it was possible all the three might die before twenty-one or marriage, in which case it was devised over." But, as to the ground assigned for the decision, see the judgment of the Master of the Rolls in the present case.

(*b*) 3 Ves. 536.

(*c*) 3 Bro. 465.

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or all dying without issue before their respective portions become payable.

The case of *Scott* v. *Bargeman* is a direct authority for this construction.

Sir *Samuel Romilly*, *Agar*, and *J. Martin*, for the defendants.

This is a mere question of construction, as to which there is no case in point except *Scott* v. *Bargeman*. The interests are vested, subject to be divested in the event of all dying under twenty-one. In this way of putting it, there is no inconsistency or contradiction. The question is, only, whether it is or not a vested interest; and this depends on another question, whether the postponement arises out of the character of those who are to take, or the nature of the fund. Here the payment is necessarily postponed on account of the life-interest of the mother. *Scott* v. *Bargeman* has never been referred to as authority in any subsequent cases; and the argument upon which the decision appears to be founded is altogether fallacious.

The case in *Dyer* was a case of necessary implication. The testator there said, the estate should not go over to his right heirs, except upon failure of all his issue. Therefore it necessarily followed that there must be cross remainders.

In *Mackell* v. *Winter*, only one case of survivorship was provided for, but others were held to be implied.

This is the mere ordinary case, of dying under twenty-one without leaving issue.

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In *Harrison* v. *Foreman* (a), the doctrine of Lord *Alvanley* is that, where there are clear words of gift, creating a vested interest, the Court will never permit that absolute gift to be defeated, unless it is perfectly clear that the very case has happened, in which it is declared that the interest shall not arise. That it must be determined that, upon the words of the will, there was a vested interest, which was to be divested only upon a given contingency; and the single question was, whether that contingency had happened.

The MASTER *of the* ROLLS.

Upon the face of the will, and independently of authority, I should have found little difficulty in deciding this case. I should have said, The shares of the residue are so given as to vest immediately in the children of the daughter, though liable to be divested by their all dying without issue under twenty-one. The contingency on which they were to be divested has not happened. They therefore continued vested, and the share of a child dying under twenty-one passes to its representative. But it was said that such a decision would be in contradiction to the authority of *Scott* v. *Bargeman* (b), and of *Mackell* v. *Winter.* (c) I shall shew hereafter that this case cannot be affected by the last of these decisions. As to the first, though I think the decision right in its result, I doubt much whether the reporter can have correctly stated the reason on which it was grounded; for it seems to imply a proposition that is untenable in point of law, namely, that the mere circumstance of all the shares being given over on a contingency does, of itself, and without more, prevent any of the shares from vesting in the mean time. I take it

A devise over, upon a contingency, does not, of itself, prevent the shares from vesting in the mean time, pro-

(a) 5 Ves. 207.
(b) 2 P. W. 69.
(c) 3 Ves. 536.

to

to be clear, that a devise over upon a contingency has no such effect, provided the words of bequest be, in other respects, sufficient to pass a present interest. Such a devise over of the entirety may indeed be called in aid of other circumstances to shew that no present interest was intended to pass; and there is another question I shall presently mention, on which it may very materially bear. But, that it is alone sufficient to prevent vesting, cannot, I think, be maintained.

vided the words of bequest be in other respects sufficient to pass a present interest, although such a devise over of the entirety may be called in aid of other circumstances to shew that no present interest was intended to pass.

In *Ingram* v. *Shephard* (a) the point was indeed made: but Lord *Northington* with great clearness decided against it. There, a residue of real and personal estate was given to the children of *Frances Shepherd;* but it was to go over if she died without leaving issue. The children that had come into *esse*, filed a bill for the rents and profits of the residuary estate. "The devisees over contended that the "children took no interest in the *residuum* in the life of "their mother, but that the whole was contingent till "her death; and that the interest and profits were in-"tended to accumulate in the mean time."

"Lord *Northington* was very clearly of opinion, that "the daughters took a defeasible interest in the residue; "and put the case of a legal devise of the residue to the "daughters, with a subsequent clause, declaring, that "if all the daughters should die in the life-time of their "mother, then the residue should go over; that would "be an absolute devise with a defeasible clause, "and the daughters would, in that case, be clearly en-"titled to the interest and profits till that contingency "happened. And decreed according to the prayer of "the bill, with liberty to apply in case of the birth of "any other child."

(a) Amb. 448.

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I have said that I thought the decision of *Scott* v. *Bargeman* right in its result, though not for the reason assigned. There was no gift to the daughters, but in the direction to the trustee to divide the fund among them at their respective ages of twenty-one years. The age of twenty-one was therefore part of the description of the legatees among whom the division was to be made.

On that principle Lord *Rosslyn*, after consideration, and looking into the authorities, decided the case of *Batsford* v. *Kebbell*. (*a*) There, the testatrix gave to *A*. the dividends that should become due after her decease upon 500*l*. 3 *per cent*. Bank annuities, until he should arrive at the full age of thirty-two years, at which time she directed her executors to transfer to him the principal sum of 500*l*. of her 3 *per cent*. annuities for his own use. *A*. died before he attained thirty-two; and the question was, whether the vesting of the legacy, or the time of payment only, was postponed till the legatee should attain the age of thirty-two. The Lord Chancellor (*Loughborough*) said it struck him that there was a very precise distinction in that case between the dividends and the fund, and that, if he construed it a gift of the fund, he must strike at the suspension of it till the age of thirty-two; and afterwards, upon reading over the bill and looking at the cases, said he was confirmed in his opinion, adding as follows: "Upon the cases it appears that dividends "are always a distinct subject of legacy, and capital "stock another subject of legacy. In this case there is "no gift but in the direction for payment; and the "direction for payment attaches only upon a person of "the age of thirty-two. Therefore he does not fall "within the description. In all the other cases the "thing is given, and the profit of the thing is given."

(*a*) 3 Ves. 363.

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If Lord *Macclesfield*, in *Scott* v. *Bargeman* (*a*), had upon this ground decided that the legacies did not vest in daughters under twenty-one, the circumstance that all the shares were given over on the death of all under twenty-one might bear very materially on the question that would then arise, whether the survivors would be entitled to the share of a daughter dying under the prescribed age. *Primâ facie* there was no survivorship, as the shares were given equally. Yet the share of a daughter dying under twenty-one could not be said to be undisposed of, so as to sink into the residue, or go to the testator's next of kin, for there was an event in which the devisee over might become entitled to it. Therefore, as the mother was to be entitled to the whole if all died under twenty-one, and yet was entitled to nothing unless all did die under twenty-one, survivorship among the children themselves seems to be implied, though not provided for in words; and it is here, and here alone, that the analogy from cross-remainders has any application. It has no bearing whatever on the other and primary question, whether the shares do or do not vest. That is a question which cannot arise in cases of cross-remainders. The only estates that are given, namely, estates-tail, do vest. The question is, what is to become of each portion of the property, as each estate-tail determines. If the limitation over is not to take effect till a failure of the issue of all the devisees in tail, and if the whole is then to go over, an inference arises, that, in the mean time, the several devisees in tail are to succeed to each other. But, with respect to personal property, if a share once vests, though liable to be divested on a contingency, the question of reciprocal succession or survivorship never can arise. If the contingency happens, the share goes over; if the contingency does not happen,

The analogy from cross-remainders applies only where the nature of the devise over is such as to raise the implication of a survivorship; not to the question whether the shares do, or do not vest.

In a devise of real estate, where a limitation over is not to take effect till a failure of issue of all the devisees in tail, and then the whole is to go over, an infer-

(*a*) See ante, note, p. 339.

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ence arises that, in the mean time, the several devisees in tail are to succeed each other. But the question of survivorship cannot arise with respect to personal property, when a share once vests, though liable to be divested on a contingency.

happen, the share remains vested, and passes to representatives.

In the case of *Mackell* v. *Winter* (a), although Lord *Rosslyn* uses some expressions not unlike those which are attributed to Lord *Macclesfield* in *Scott* v. *Bargeman*, yet there is not to be found in his judgment any thing like a distinct proposition that, by the devise over, without more, the vesting was prevented. He makes two questions.—First, whether the shares vested. If they did,

(a) 3 Ves. 536. There the testatrix directed her household goods, &c. to be sold, and the produce, together with the residue of her personal estate, she bequeathed to her two grandsons and her grand-daughter, "to be equally divided between them share and share alike; the shares of her grandsons, with the interest and accumulations, (after a deduction for maintenance and advancement,) to be paid to them respectively upon their attaining their ages of 21, and the share of her grand-daughter, with the interest and accumulation, at 21 or marriage." Then, after a direction for maintenance and advancement, she declared that in case her grand-daughter should die under 21 and unmarried, her share should go to and be equally divided between her grandsons; and, in case of the death of either of them, the whole should be paid to the survivor; and that, in case either of her said grandsons should die under 21, the share of her said grandson so dying should go to the survivor; and, in case both her grandsons should die under 21, and her grand-daughter should die under 21 and unmarried, the whole of their respective shares should go over.

The two grandsons died under 21; the grand-daughter married. The Master of the Rolls declared the plaintiff (who was the devisee over) entitled to the two-thirds, and the grand-daughter to her one-third only. But, on appeal, the decree was reversed, and the grand-daughter declared entitled to the whole, upon the ground of *necessary implication*.

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did, there was an end of the grand-daughter's claim: The representative of the surviving grandson was entitled. If they did not, still there was a second question to be considered; whether the grand-daughter was entitled to the whole by survivorship, there being no provision for survivorship in the case that had happened. And it is to this second question that *Lord Rosslyn* (after having decided upon all the grounds which the will furnished, taken together, that the shares did not vest) principally applies the argument drawn from the mode in which the shares are given over. But what are the grounds on which he holds the shares not to have vested? Not merely because they are given over —but because he thought it apparent from different provisions in the will, that the testatrix did not mean any of the legatees to take an interest in the residue before twenty-one, except in so far as the executors were authorized to make an expenditure for maintenance or preferment. Every thing beyond what might be wanted for those purposes was to be accumulated.— Until twenty-one, none of them was to have any right to the accumulation; and, if they all died under twenty-one, the residue with the accumulations was to go over to the testatrix's nephew. That, to be sure, was inconsistent with the notion of a vested interest in a residue, which entitles the legatee to the produce of such residue even when the payment is postponed till twenty-one. But in the present case, there is not a single circumstance or expression in the will, that has been relied upon, as shewing an intention to defer the vesting, excepting the bequest over. The directing payment to be made at twenty-one does not postpone vesting, even in the case of a common legacy, still less in the case of a residue. There is, indeed, a clause authorising the executors to apply the interest and dividends of the children's portions for their education, maintenance, or

Direction for payment at 21 does not postpone vesting even in the case of a common legacy; and still

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less in the case of a residue.

or other benefit or advantage; but there is nothing that can exclude their right to the surplus of income that might not be so employed; nor is there any thing that could entitle those who were to take in the event of all the children's dying without issue under twenty-one, to claim the surplus interest and produce of the residue during the lives of those children. Not one word is said about survivorship among the children; whereas, in *Mackell* v. *Winter* there was an anxious provision for survivorship in all the cases that had occurred to the testatrix, and it was evident that it was by a mere slip that it was not provided for in the case that actually happened.

On the whole, the present case comes round to what is stated at the outset—namely, that the shares vested from the beginning,—that the contingency has not happened on which they were to be divested,—consequently the share of the deceased child has been properly paid to her representative.

Rolls.
July 25.
1815.

RICHARD HARDMAN, Plaintiff;

AND

JOHN JOHNSON, HENRY LAWRENCE, and BENJAMIN CORFE, - - Defendants.

[The following case was decided before the period at which these Reports commence; but it is inserted in this place on account of its reference to the principle of one of the points in *Randall* v. *Russell*, which see *ante*, p. 190.]

Testator gives to his daughter *B.* a leasehold, held under the corporation of *L.* for three lives and twenty-one years after the death of the survivor, "for all his estate and interest therein." He gives other parts of his property to his son, and two other daughters; and the residue of his estate, real and personal, to be equally divided between his three daughters and his son; with a proviso that, in case of the death of any without leaving issue, "the dying child or children's *share or shares*" should go over to and be divided among the survivors; followed by a clause that any or either of his said children who should dispute his will should have no benefit from any thing therein contained, but the *share or shares* therein before given to him, her, or them, should go to the others.

B. enters on the leasehold given her by the will, and, after the expiration of the three lives, but during the twenty-one years which commenced on the death of the survivor, obtains a renewal. She then dies, after the expiration of the twenty-one years, without issue, having by her will given the premises to *J. J.* "for all her estate and interest therein." On her death, *S.*, the only surviving child of the testator, enters by virtue of the proviso in his will. *J. J.* brings ejectment, and recovers possession; and afterwards purchases the reversion in fee, for which the option is given him, as tenant of the premises, by the corporation.

Held, That the proviso in the will, with reference to the subsequent clause, extended to all the interests taken by the children under the will, and was not confined to the residue only; the meaning of the word *shares* being explained by that subsequent clause.

Held, also, That the renewed lease was purchased by *B.* as trustee of the term, and went over to *S.* upon her death without issue.

But,

ROBERT JOHNSON, being possessed of certain messuages and premises at *Liverpool*, under a lease from the mayor and corporation, for the lives of himself

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But, with respect to the reversion in fee, it was further held, That *J. J.* was a purchaser thereof for his own benefit, there not being enough in the case to extend to it the principle upon which the renewed lease was held to be taken for the benefit of those in remainder.

himself and two other persons and the life of the survivor, and for a term of twenty-one years expectant on the death of the survivor, made his will, by which, after devising certain other estates to his son *Thomas Johnson* (subject to certain annuities), he gave and devised the premises in question to his daughter *Betty Johnson*, her executors, &c. during all his term and interest therein. He then gave another leasehold estate to his daughter *Ellen*, her executors, &c. for and during all his term and interest therein; the reversion of certain other estates (subject to a term of years subsisting therein) to his two daughters *Betty* and *Ellen*, their heirs and assigns for ever, as tenants in common; the reversion of other premises, also on lease, to his daughter *Sarah*; his household goods, furniture, &c. to his wife, during her widowhood, and, upon her death or second marriage, to be divided among his three daughters, or such of them as should be then living; and the residue of all his estates, real and personal, to his said son and daughters, their heirs, executors, &c. to be equally divided; with a proviso, "that in case any of his said children should die "without issue living at his or her decease, the dying "child or children's share or shares of his said estate "therein before respectively given to him, her, or them, "should go to and be equally divided among the sur- "vivors or survivor, their, his, or her heirs, executors, "&c.;" and he thereby directed that, if any of his said children should cause any differences, disputes, or lawsuits, to be had or brought touching any matter or thing in his will contained, with intent to alter the plain sense, true intent, or meaning thereof, or should refuse to comply with the same, then and in such case, such of his said children as should cause such differences should have no benefit or advantage from any thing in his said will, but the share or shares therein before given to him, her, or them, should go to the others of his said children;

and

and he thereby appointed his said wife and son, and his daughter *Ellen*, executors of his will.

The testator died on the 20th of *April* 1760, leaving his son *Thomas* his heir at law, and his three daughters named in the will; and after his death *Betty Johnson* entered into the possession of the corporation lands devised to her, and continued possessed thereof till her death. In 1769, the last of the three lives for which the same were holden expired, whereupon the term of twenty-one years expectant on the death of the survivor commenced; and, in the month of *December* of that year, *Betty Johnson* obtained a renewal of the lease for the lives of herself and of two other persons, and twenty-one years expectant on the death of the survivor.

Thomas Johnson (the son of the testator) died in the lifetime of *Betty*, leaving a son, *John*, (the defendant,) his heir at law, and heir at law of the testator. *Ellen* survived *Thomas*, and also died in the life time of *Betty*, without issue and unmarried. In 1764, *Sarah* married *Richard Hardman* the plaintiff.

Betty Johnson died in 1798, without issue and unmarried, leaving her nephew the defendant *John Johnson* her heir at law, and *Sarah* (the plaintiff's wife) the only remaining child of the testator, her surviving, having first made her will, whereby she gave the premises in question to the defendant *John Johnson*, his executors, &c. for all her estate and interest therein (subject to the payment of debts and legacies in case the residue of her estate should be insufficient for that purpose); and appointed the said defendant, and *Richard Hardman* (the plaintiff), her executors.

Upon the death of *Betty Johnson* without issue and unmarried

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unmarried as aforesaid, the plaintiff and his wife entered into possession of the premises in question, notwithstanding her will, claiming to be entitled under the will of the testator by the plaintiff's wife having survived all the other children of the testator. In 1800, the defendant *John Johnson* brought an ejectment, on which he recovered possession of the premises; the Court of K. B. being of opinion that, *Betty Johnson* having procured such renewed lease of the premises, the same passed by her will; and, since taking possession, he had bought the reversion of the same premises by virtue of an option granted him by the corporation, as the person appearing to be entitled to the lease thereof. The plaintiff's wife died in the same year, 1800, leaving the plaintiff her husband (who had taken adminstration) and *Richard Hardman* the younger, her eldest son and heir at law. This *Richard Hardman* had become bankrupt, and the other defendants were his assignees.

The bill, stating these facts, insisted that the defendant *Johnson* having purchased the reversion under such circumstances, the plaintiff ought to be held entitled to the benefit of the purchase; offering to pay the money for the same; charging also. that *Betty Johnson* took the new lease of *December* 1769, subject in equity to the same conditions, limitations, and provisoes, as the original lease was made subject to by the will of the testator; and therefore prayed that the defendant *John Johnson* might be decreed to convey the premises comprised in the deed of the 15th of *December* 1769 to the plaintiff and his heirs for ever, and to deliver up possession thereof, and also to convey to the plaintiff the reversion in fee expectant on the determination of the last-mentioned grant, and to account for, and pay over to the plaintiff the rents and profits during the time he had been in possession or receipt thereof; the

the plaintiff offering to pay him such part of the fine for renewal (if any) as he should appear to be entitled to, and also the purchase money for the reversion, with interest, in case it should appear that that purchase money was not a distinct sum from the purchase money of the other premises purchased by him; and a reference to the Master to ascertain and state what was the value of the reversion at the time of the purchase, and what ought to be paid to the defendant by the plaintiff in respect thereof.

The defendant, by his answer, insisted that the clause of survivorship was confined to the residue; which, by the clause immediately preceding, was given to all the children, equally to be divided among them. That the premises in question were devised to *Betty Johnson*, absolutely, for all the testator's interest therein, which interest expired long before her death, and she afterwards, to the time of her death, continued in possession under the new lease granted her by the Corporation and purchased with her own money. That, in the trial of ejectment, the merits of the case had been solemnly argued. He further said, that he had purchased the reversion for a valuable consideration, together with other lands adjoining, without distinction, under the same contract.

Bell and *Parker*, for the plaintiff.

Sir S. *Romilly* and *Horne*, for the defendant.

The MASTER *of the* ROLLS, on the first question, (*viz.* whether the proviso in the will of *Robert Johnson* referred to, and controuled, the former specific bequests, or alluded only to the gift of the residue immediately preceding it,) observed that the word "shares" (" the " dying

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"dying children's *shares* of his said estates") was more applicable to property given generally than to what was specific, *viz.* the distinct portions before given to all the children; but that the question must always be, in what sense it was used in the particular instance:—that here it might be doubtful, on the first clause, what was actually meant, but that which followed, excluding from all benefit or advantage under his will such of his children as should dispute it, and directing that their "shares" should go over to the others, made it clear that, in using the word, he had reference to every bequest under that will.

As to the other question, he said it was (as far as respected the reversion purchased by the defendant) a new one; but he should hesitate a good deal before he refused to apply to it the principle which had been established as to the renewal of a lease; and that it would be dangerous to allow the trustee of a term to resort to the owner of a reversion to become a purchaser for his own benefit; for by that means he would debar his *cestuy que trust* of the fair chance of renewal, getting into his own hands the power to grant a renewal or not at his option. As a new point, His Honour said he would take time to consider it.

On a following day, His Honour stated it to be his opinion, that the plaintiff was entitled to the benefit of the renewed lease; but not to the benefit of the purchase made by the defendant of the reversion.

END OF THE SECOND PART.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

1817.



57 Geo. III. 1817.

The ATTORNEY GENERAL, at the Relation of BENJAMIN MANDER, and the Reverend JOHN STEWARD, Informant, and the said BENJAMIN MANDER and JOHN STEWARD, PLAINTIFFS;

July 14—17.

AND

JOSEPH PEARSON, JOSEPH STANLEY, JOSEPH BAKER, THOMAS WILLIAMS, BENJAMIN STANLEY, and ABEL WHITEHOUSE, - - - DEFENDANTS.

Information and bill to quiet the possession of the relators and plaintiffs (one claiming as the surviving trustee, the other as minister, of a Protestant Dissenting meeting-house); for an appointment of new trustees; and an injunction to stay proceedings in ejectment by the defendants, claiming also to be trustees of the meeting-house. Upon motion for an injunction, it appearing that the meeting-house was

THE information and bill, filed on the 1st of *February*, 1817, stated that about 150 years ago, a meeting-house, or place of worship for Protestant Dissenters

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senters from the established church, was erected in *John-street, Wolverhampton;* and, as well at the time of erecting the same, as from time to time since, various grants and pecuniary bequests and other endowments had been made thereto by different persons, for the purposes of supporting a minister, and of defraying the expenses of repairing and maintaining the same, and for other purposes of a like nature. That the said meeting-house, together with an adjoining building, which was used as a school-room and as a vestry for transacting the secular affairs of the congregation, and together with a dwelling-house, also adjoining, which had for many years past been used as the residence of the minister for the time being officiating in the said meeting-house, was originally vested in the names of trustees for the purposes aforesaid, and declarations of trust thereof were duly executed by such trustees; and, as such trustees had from time to time died, or become incapable to act in the trusts, new trustees had been nominated and appointed, and the said meeting-house and premises had

was erected in the year 1701, under a trust-deed, whereby the purpose was declared to be "for the worship and service of God;" the plaintiffs and relators contending, from the purpose so expressed, that the intention was for promoting the doctrine of the Holy Trinity, and that the trust could not be diverted from the purpose for which it was intended; the defendants insisting that the intention was as general as the purpose expressed, and had no regard to any particular tenets; it being also made a question, whether a trust for supporting Unitarian worship is legal and can be supported; and it being further disputed who, according to the true construction of the deed, were entitled, as trustees, to the possession; and whether the minister of a Dissenting congregation, elected for a limited period, is afterwards removable at pleasure; and also as to the construction of the deed, and as to an alleged agreement or understanding between the parties, with regard to such removal: the injunction was granted (upon the parties undertaking to abide by such order as the Court should thereafter make), and it was referred to the Master to inquire in whom the legal estate was vested, the particular object (with respect to worship and doctrine) for which the trust was created, the usage of Protestant Dissenters as to the election of ministers, and the duration of their office, and whether any agreement or understanding relative thereto subsisted between the parties.

been,

been, by proper conveyances from the surviving or continuing trustees, conveyed to and vested in such surviving or continuing trustees and the new trustees jointly, upon the trusts aforesaid, and the rents and profits, &c. from time to time paid to the trustees, or to the minister for the time being, and by them applied to the purposes for which the same were so given. That, in the year 1776, the plaintiff, *Mander*, (with other persons since deceased,) was duly nominated and appointed to be a trustee jointly with the then surviving or continuing trustees, and the trust premises were by proper deeds conveyed to and vested in them, jointly with the continuing or surviving trustees, and the same were then become vested in *Mander* solely by right of survivorship. That the meeting-house was originally built by Protestant Dissenters, professing Trinitarianism, and for many years such principles were professed by the subscribers and congregation assembling therein, and the said several funds and endowments were by the trusts thereof declared, or by the intentions of the donors directed, to be expended (and were accordingly for many years laid out,) in maintaining and promoting a belief in the doctrines of the Holy Trinity, and the ministers from time to time officiating in the said meeting-house were Trinitarians; but, in the year 1782, a division in opinion arose between the then trustees (about ten in number) and the subscribers, as to who should succeed to the then vacant office of minister, and the Reverend ——— *Jameson* was thereupon elected by a considerable majority of the trustees and subscribers, and was duly invited to preside over the congregation; but the minority of the then acting trustees and subscribers obtained possession of the meeting-house and premises, and entirely excluded *Jameson* therefrom, and proceeded to elect and call The Reverend *Samuel Griffiths* to the office of

 minister,

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minister, which call was accepted by him, and he officiated therein for several years, during which time he received the profits and emoluments of the office arising out of the said grants and endowments, although he never preached, nor professed to believe, the doctrines, for the maintenance of which the meeting-house was originally built and the said grants and endowments made; and ever since that time the trust premises had been appropriated to support and teach doctrines wholly opposed to those of the original founders, and contrary to the original trusts or intentions of the institution. That, since *Mander* was appointed a trustee, there had been no regular nomination of trustees, but various persons had from time to time intruded themselves, without being properly elected, or having the premises duly conveyed to them, and had received and misapplied the rents, &c. That the defendants then claimed to be trustees of the premises, and were in the possession and receipt of the annual income arising therefrom. That the plaintiff, *Steward*, was then, and for some time past had been, minister, and was entitled to the full emoluments of the office, arising as well from the endowments, as from subscriptions for pews, and voluntary subscriptions; and the plaintiff, *Mander*, as surviving and sole trustee, was entitled to the possession of the trust premises, and to receive the annual income arising from the said funds and endowments, pursuant to the trusts thereof.

The bill and information charged that, according to the custom established in the meeting-house, and to the original trusts thereof, no new trustee could be chosen, without the consent of all the surviving or continuing trustees. That *Mander* had never assented to the nomination of the defendants; and that, at no time since he (*Mander*) was appointed a trustee, the whole of the trustees for the time being had concurred in the choice

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of new trustees, and therefore the defendants were not properly authorised to become trustees, or to take upon themselves the execution of the trusts, and there had been no legal or effectual conveyance made to them. That the intention of the donors was to promote the belief of the Holy Trinity, and that the Meeting-house was built by the voluntary subscriptions of persons having like intentions; but the defendants had not so employed the same, and, since they had been in possession, the doctrine of the Holy Trinity had not been taught in the Meeting-house; but that they belonged to a sect of Protestant Dissenters called Unitarians, professing themselves to be opposed to Trinitarianism; and, therefore, the said meeting-house and premises, and the annual income of the said trust-funds and endowments, had not been applied pursuant to the trusts thereof.

The plaintiff *Steward* charged, that he was Minister of the congregation, and did then conscientiously and publicly profess to believe in the Trinity, and as such was entitled to the use of the Meeting-house, for the purpose of public worship, and to the occupation of the school-room and dwelling-house thereto adjoining, and to receive and be paid the surplus revenue of the trust-funds and estates, after all out-goings were deducted. That he had been minister for more than three years, and, during that time, the defendants had not only allowed him a very small part only of the revenues by way of stipend, but had endeavoured to get possession of the meeting-house and school-room, and to exclude him from the occupation thereof, and for such purpose had lately affixed new locks and bolts to the doors, and locked up the iron gates leading into the court-yard, and the front doors of the meeting-house, and refused to allow to the plaintiff any part of the annual income arising from the trust premises.

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The information and bill further charged, that the defendants threatened to proceed to elect a new minister, and permit him to receive the revenues, but, not being trustees duly appointed, were wholly incompetent so to act; and nevertheless they had proceeded to serve the plaintiff *Steward* with a notice to the following effect:—"20th *January* 1817. We, the trustees of the Dissent-"ing meeting-house, and the property thereunto be-"longing, in *John-street* in this town, beg to acquaint "you that we have, in conjunction with the subscribers, "elected the Reverend Mr. *Guy* to be the minister of "the aforesaid meeting-house. We therefore give you "notice thereof, and desire that you will, without delay, "give us possession of the same. We request your "immediate attention, and, should we not receive your "answer in the affirmative, on or before *Thursday* next, "we shall conclude it is not your intention to comply "with this notice;" which notice was signed by four of the defendants; and they then threatened to proceed to law to obtain possession of the premises; whereas the said plaintiff charged, that, as minister, he could not be dismissed without his own consent, or gross immoral conduct; that he had been guilty of no such gross immorality of conduct, but had constantly performed the duties imposed upon him; and, further, that, as well the plaintiff *Mander* as a majority of the then subscribers to the meeting, were in favour of his continuing in the said office.

The plaintiff *Mander* also charged, that the defendants had obtained possession of title-deeds, &c. relating to the premises, and refused to permit the plaintiff to see or have possession thereof.

The prayer was for an account of the trust premises;—a declaration that the plaintiff *Mander* was entitled to retain

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retain possession of the meeting-house, &c. upon the trusts aforesaid, and that he might be quieted in such possession by injunction;—a declaration also that the said plaintiff was entitled to receive the annual income of the trust premises, to be by him applied to the purposes aforesaid, and that the defendants might be decreed to deliver up to him all title-deeds, &c. in their possession, and to account with him for all monies received by them in respect of the premises, and of the application thereof, and to pay to him what should appear to be due from them on such account, to be by him applied to the purposes aforesaid;—that the plaintiff, *Steward*, might be quieted in his office of minister, and in the use of the meeting-house, for the purpose of public worship, and in the occupation of the school-room, vestry, and dwelling-house, by the like injunction, until he should have been legally dismissed, and a new minister duly elected;—that new trustees might be appointed jointly with *Mander*, and that the trust premises might be duly conveyed to *Mander* and such new trustees jointly;—and an injunction to restrain the defendants from intermeddling with the meeting-house and premises, and from all proceedings at law to recover possession thereof, and from interfering in the execution of the trusts thereof, and from electing and nominating any other minister in the room of *Steward*, without *Mander*'s consent.

The defendants, by their answer, stated that, in the year 1701, a meeting-house, or place of worship for Protestant Dissenters from the Established Church, or for such purposes as mentioned in the deed after stated, was, (under such circumstances, and in such manner as therein stated,) erected in *John-street*, *Wolverhampton*. That, by an indenture of feoffment, dated the 18th of *September* 1701, between *John Russel* of the one part,

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and *Joseph Turton* the elder, *Thomas Sutton*, *John Scott*, and *Abraham Pearson*, of the other part, it was witnessed that, in consideration of 10*l*., the said *Russel* granted, enfeoffed, and confirmed unto the said *Turton*, &c. their heirs and assigns, the premises whereon the said meeting-house was erected, and on which it was then standing, to hold unto the said *Turton*, &c. their heirs and assigns for ever.

That, by an indenture dated the 30th *October* 1701, between the said *Joseph Turton* the elder, *Thomas Sutton*, *John Scott*, and *Abraham Pearson*, of the one part, and *John Stubbs*, minister, together with several other persons therein named, parties thereto, of the other part, after reciting as aforesaid, and further reciting that, since the time of the purchasing of the above-mentioned parcel of land, at the charge of all the parties thereto, and others, there was then erected and built a large new structure thereon; it was thereby witnessed, that it was granted, agreed, and declared, by and between the parties thereto, that the aforesaid grant was in trust for the purposes aftermentioned, and the purchase-money remitted by the said *Joseph Russel*. And it was the true intent of all the parties to the said grant, and all others who had contributed towards the building, that there should be a house built upon the said parcel of land, (which had since been done accordingly,) and the same was intended for a meeting-house for the worship and service of God. That the pews therein should, from time to time, be disposed of by the order of the trustees for the time being, or the major part of them; and that, upon the death or removal of any one or more of the trustees, it should be lawful for the residue, or the major part of them, within two months next following, to nominate and elect such persons to be trustees, for the purposes therein mentioned, as should supply the vacancies of such as should so happen to die, or remove their

their habitations out of the town of *Wolverhampton*, and the precincts thereof. That the number of the trustees should be continued to twelve or more, and that they, or the major part of them, should from time to time, upon any meeting to be appointed to consult upon matters in any respect relating to the said meeting-house, make such orders therein as they should think convenient; such orders to be binding on all parties concerned. That due notice should be given of all such meetings, and a book kept for such orders so to be made thereat. And then followed this clause, *viz.* "That if, at any time there-"after, meetings for the worship and service of God "should be prohibited by law, and thereby the meeting "house should become useless, it should be lawful for "the trustees for the time being to sell and dispose of the "same, the money raised therefrom to be disposed of "to such charitable uses as the trustees, or the major "part of them, should appoint; or otherwise to convert "the said meeting-house into dwellings for the use of "the aged, infirm, and impotent people, who live in the "fear, and attend upon the worship of God, to dwell "in, as the said trustees, or the major part of them, "should nominate or appoint." And it was thereby further provided, "that if any of the trustees for the "time being should misbehave themselves in the ma-"nagement of the trust, or should do any thing scan-"dalous or offensive to the residue of the trustees, or "any of them, it should be lawful for the residue of "the trustees to call a meeting in manner aforesaid, "and, upon hearing such misbehaviour, &c. they the "said trustees, or the major part of them, should have "power to remove any such persons from the trust, "and to elect other fit persons in their places."

That by indentures of lease and release (17th and 18th of *December* 1742) between *William Pearson*, of the

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the one part, and *Joseph Turton* and others therein named as parties thereto, of the other part, after reciting the deed of 1701, and that *Abraham Pearson* had survived *Joseph Turton* the elder, *Thomas Sutton*, and *John Scott*, and died leaving the said *William Pearson*, (party thereto of the first part,) his son and heir, whereby the title in law to the premises vested in him the said *William Pearson*, and that the several parties thereto of the second part had been duly chosen trustees of the said meeting-house, and the said *William Pearson*, in fulfilment of the above trusts, did grant, &c. unto the said *Joseph Turton* and others, (parties thereto of the second part,) their heirs, &c. all the said premises, upon the trusts aforesaid.

That, by indenture of feoffment, dated the 18th of *April* 1772, made and executed by and between *John Mansell* and others, of the first part, the said *Joseph Turton* and others, (among whom was the plaintiff *Mander*,) of the second part, and *John Cole*, Dissenting minister, of the third part, reciting that all the trustees appointed by the last-mentioned indenture were since dead, except the said parties thereto of the first part, and that the said parties thereto of the second part had been chosen trustees for the purposes aforesaid, it was witnessed, that the said parties of the first part did grant, &c. unto the said parties of the second part, their heirs, &c. all the said premises, in trust for the purposes, &c. mentioned in the said deed of 1701. This indenture contained a power of attorney to deliver seisin, with a memorandum of livery of seisin indorsed.

The answer further stated, that, by *indentures of lease and release (1st and 2d of *February* 1720) between *John Scott* of the one part, and *Joseph Turton*, and others therein named as parties thereto, of the other part.

part, it was witnessed, that, for the considerations therein mentioned, the said *John Scott* did grant, &c. unto the said *Joseph Turton*, &c. their heirs, &c. an acre of land therein described, in trust to permit the rents, issues, and profits to be received by *Abraham Pearson*, (long since deceased,) during his life, and after his decease by the minister for the time being, who should be the stated and settled minister of the congregation or society of Dissenting Protestants belonging to the said meeting-house, towards the support and maintenance of such minister, for ever. But in case the statute then in force, entitled, "An Act for exempting their Majesties' "Protestant Subjects dissenting from the Church of "*England* from the Penalties of certain Laws," (*a*) should at any time thereafter happen to be repealed, and the said congregation should by law be prohibited to assemble for the worship and service of God, that then and in such case, the trustees should, from time to time, during such prohibition, pay the whole of the rents, issues, and profits to the person that was minister of the congregation at the time of such repeal or prohibition, for and during his life, for his sole use and benefit, and, after his death, to and for the use and benefit of such silenced Protestant Dissenting Minister, or Ministers, as the trustees for the time being, or the major part, should nominate and appoint; provided that, when and as often as any of the trustees should die, or desert or forsake the said congregation, and should change or become of any other religion or persuasion whatsoever, contrary to and different from the said congregation; or in case any of the said trustees should, at any time thereafter, remove eight miles distant from the town of *Wolverhampton*, to inhabit or dwell, that then and in every such case the

(*a*) The Toleration Act, 1 W. & M. c. 18.

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surviving or other trustees, or the major part, should, within ——— days next after such decease, desertion, or removal, by any note or memorandum in writing, to be subscribed by the said trustees, or the major part of them, elect and nominate one of the most sufficient substantial persons of the congregation to be trustee, in the place of him or them so dying, deserting, or removing; and, in case the said trustees, or the major part, should refuse or neglect, within such time, so to elect and nominate, &c. then it should be lawful to and for the minister of the said congregation for the time being, (if any such there be,) or else for such silenced Dissenting Protestant minister, or ministers as aforesaid, for the time being, to whom the rents and profits of the premises thereby granted should of right appertain, by any note, &c. under his or their hand, to elect and nominate such trustee or trustees, upon the same trusts as aforesaid, and so from time to time, &c. whereby the said trust might have a perpetual continuance, and might not come to or vest in the heirs of any surviving trustee, or in any person or persons whatsoever not of the said congregation.

That by indenture of feoffment (6th of *August* 1772,) made and executed by and between *Richard Fowler*, of the first part, the said *John Marshall* and others (among whom were the plaintiff *Mander* and one *Isaac Headley*), of the second part, and the said *John Cole* of the third part, after reciting the indentures of 1720, and that *Richard Fowler* (one of the parties thereto of the second part) had survived all his co-trustees, and was since dead, leaving the said *Richard Fowler*, (party to the now stating indenture,) his son and heir, whereby the title in law to the said premises vested in him, and that the said *John Marshall*, and the several other persons, (parties thereto of the second part,) had been duly chosen trustees;

tees; and the said *John Cole*, as minister of the said meeting-house, had requested the said *Richard Fowler*, (party thereto,) to convey, &c. it was witnessed, that, in pursuance, &c., the said *Richard Fowler* did grant, &c. unto the said *John Marshall*, &c., their heirs, &c., all the said premises, &c., upon the trusts aforesaid. This indenture also contained a power of attorney to deliver seisin, with a memorandum of livery of seisin indorsed.

The answer further stated, that, in or about the year 1782, a sum of 200*l.* was given by the will of the said *John Marshall* to and for the use of the society of Protestant Dissenters attending the said meeting-house, and another sum of 200*l.* was also given by the will of *Abraham Hill*, to and for the use of the said society. That the two last-mentioned sums (with 99*l.* 15*s.* which had from time to time been accumulated) were invested by the trustees of the meeting-house in the purchase of 800*l.* 3 *per cent.* reduced annuities, which was sold out in the year 1807, under the authority and direction of the major part of the said trustees, and produced the sum of 502*l.*, 240*l.* (part whereof,) was applied in the purchase of certain leasehold houses, and the residue, amounting (after certain deductions) to 260*l.*, lent out at interest to a brother of the plaintiff *Mander*, upon the security of his promissory note. That the sum of 100*l.* was, in 1800, given by the will of the said *Benjamin Corson*, upon trust to be put out at interest, or invested, and the produce from time to time to be paid to the minister, for the time being, who should officiate at the said meeting-house; and that in *March* 1793, the trustees therein named, together with the then trustees of the meeting-house, purchased therewith, and with 63*l.* raised by voluntary subscription, a leasehold stable, which

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which then stood in front of the meeting-house, and had since been removed.

The defendants admitted that there was adjoining to the meeting-house a building used as a school-room and a vestry for transacting the affairs of the congregation, but said that the same was built in the year 1794, and the expense discharged by voluntary subscription of the defendants and other members of the congregation, neither of the plaintiffs (to the best of their knowledge) having contributed thereto.

They also admitted that there was a dwelling-house adjoining the meeting-house, which had sometimes (but not uniformly for many years past) been used as the residence of the minister, but said that the same had at other times been let to other persons in such manner as the trustees for the time being, or the majority, had thought proper.

They admitted that, as the trustees of the meeting-house and premises had from time to time died, or become incapable to act, or declined, or disqualified themselves from acting, new trustees had been appointed, and the premises conveyed to and vested in them jointly with the surviving or continuing trustees. That, since they (the defendants) had been trustees of the premises, and (they believed) prior to that period, the rents and profits had been from time to time paid to the trustees, or to the minister, for the time being, and by them applied to the purposes for which the same were so given. They admitted that all the trustees named in the deeds of the 18th of *April*, and 6th of *August* 1772, respectively, were since dead, with the exception of the plaintiff *Mander;* and said they were advised that the legal estate in one fifth of the premises comprised in the first and

and in two-sixths of the premises comprised in the second, of the said deeds, had become vested in the said plaintiff solely by right of survivorship. They could not set forth, of their belief or otherwise, whether the meeting-house was originally built by Protestant Dissenters professing Trinitarianism, nor whether for many years and down to what time, such principles were professed by the congregation assembling there; save that, in the year 1780, some of the congregation (as they believed) professed to be Trinitarians, and others professed different sentiments. They denied (to the best of their belief) that the trust funds and endowments were by the trusts thereof declared, or by the intentions of the donors, or by any other means, directed to be, or that the same were for many years or down to any time expended in maintaining and promoting a belief in the doctrine of the Holy Trinity; and on the contrary, they insisted that the meeting-house and premises were by the said deeds appropriated for the purpose of promoting the worship and service of Almighty God, and for the use of Protestant Dissenters, without any mention of Trinitarianism, or any other doctrine whatever, to be preached in such meeting-house: and said that such funds and endowments had been (as they believed) so applied accordingly. They knew not whether the ministers, from time to time, were Trinitarians, or how otherwise; but they stated that, in the year 1782, a division in opinion arose among the then trustees (ten in number), and the subscribers, as to who should succeed to the office of minister then vacant. That Mr. *Jameson* was not upon that occasion elected by a majority, but, on the contrary (as appeared by a memorandum-book in their possession, containing a full and particular account of all matters relating to that occasion), that much dissension took place among the then trustees as to the invitation of *Jameson*, which was objected to by six out of the ten,

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ten, and actually given by a minority of four, the six who objected refusing to sign the invitation, and also subsequently refusing to allow *Jameson* to officiate as minister. That the majority (and not the minority) of the said then acting trustees and subscribers obtained possession of the meeting-house and premises, and excluded *Jameson* therefrom, by reason of his not being duly invited or elected. That the majority in like manner proceeded to elect Reverend *Samuel Griffiths*, who accepted their call, and officiated as minister, from his appointment in 1782, to his death in 1804, and, during such time, received the profits and emoluments of the office arising out of the said grants and endowments. They denied (to the best of their belief) that *Griffiths* never professed to believe, or never preached, the doctrines, for the maintenance of which the meeting-house was originally built and the said grants and endowments made, and said that (on the contrary) he did (as they believed) preach the word of God, which were the doctrines, for the promotion whereof the said meeting-house was erected. They said that, prior to *January* 1793, all the trustees appointed by the deed (18 *April* 1772) had died, except *Benjamin Corson*, *Peter Pearson*, *Abraham Harper*, *John Hickcox*, and the plaintiff *Mander*, and all the trustees appointed by the deed of 6th *August* 1772, had died except the said *Benjamin Corson*, *Peter Pearson*, *Abraham Harper*, and *John Hickcox*, together with *Isaac Headley*, and the said Plaintiff. That, from the year 1783, the plaintiff *Mander* declined and ceased to act as trustee under either of the deeds, and changed his place of worship, and ceased to be a subscriber to the meeting-house, or to frequent the same, and he was therefore to be considered (as defendants were advised) to be no longer a trustee under such last-mentioned deeds, or either of them. That the said *Isaac*

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Headley never acted as a trustee under the deed of 6th of *August* 1772, and died without having ever so acted.

That about the latter end of 1792, a meeting took place (pursuant to the powers contained in both deeds of 1701 and 1720) for the election of new trustees in the place of such as were then dead or had declined or ceased to act under the trusts of the said deeds respectively; and it was, upon such occasion, agreed by the surviving trustees then present, or the major part, that the several persons therein mentioned (among whom were the defendants, *Baker*, *Pearson*, and *Joseph* and *Thomas Stanley*), should be elected and appointed to act as trustees under both deeds, together with *Corson*, *Peter Pearson*, *Harper*, and *Hickcox*, in the place or stead of the plaintiff *Mander*, and *Headley*, by reason of their having so ceased or declined to act as aforesaid; and, in pursuance of such arrangement, a deed (9th *January*, 1793) was duly made by and between the said *Corson*, *Peter Pearson*, *Harper*, *Hickcox*, and the plaintiff *Mander*, (as such surviving trustees of the premises contained in the deed of 1701,) of the first part, the said several persons, together with *Headley* (as such surviving trustees of the premises contained in the deed of 1720), of the second part, and the four defendants, together with the other persons so elected as aforesaid, of the third part, whereby, after reciting that for the purpose of preserving and continuing the charitable uses therein mentioned, the said surviving trustees had proceeded to the choice of new trustees as aforesaid, it was witnessed that they the said parties thereto of the first and second parts respectively did grant, &c. unto the said parties thereto of the third part, their heirs, &c., all the said respective premises upon the trusts of the said indentures of 1701 and 1720 respectively. This deed also contained a power of attorney from the par-

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ties thereto of the first part, to *Griffiths*, "to give quiet "and peaceable possession and seisin of the premises "in the name of the whole unto the several parties "thereto of the third part, or any two or more of them "to the use of all, to be had and held according to the "tenor thereof." But no livery of seisin was indorsed thereon. The last stated deed was duly executed by the parties of the first and second parts respectively, except *Mander*, who refused to execute the same when tendered, and had never since executed, and *Headley*, who also never executed, and was since dead. Two of the defendants, (*Whitehouse* and *Benjamin Stanley*,) said that, although they considered themselves as having been duly nominated trustees under the said deed, yet they had long since declined, and did then decline, to act in the trusts thereof.

The answer went on to state, that about the end of *March*, 1813, the office of minister was vacant, and the four other defendants (as the sole acting trustees), with the privity and consent of the congregation then attending the meeting-house, invited the plaintiff, *Steward*, to officiate as minister, and, after he had so done for a short time, and had declared himself of religious opinions approved by the congregation, and preached and enforced doctrines in unison with their sentiments, he was invited, at the desire of the congregation, to become the minister and preacher of such meeting-house for the limited period of three years from the 23d of *May*, 1813, and, having accepted such invitation, thereupon entered into possession, as from the said 23d of *May*, 1813, of the dwelling-house. That, after the expiration of the three years, he continued, without any renewal of his appointment, to take upon himself to officiate as such minister; and that the said four defendants, and the other members of the congregation, having become dissatisfied with his

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his conduct, and having discovered (as the fact was) that he had changed his religious tenets, it was determined by them that he should no longer so officiate; whereupon, on the 1st of *September*, 1816, a meeting took place of the trustees and other members of the congregation, when the following resolutions were proposed and adopted by all present except two or three who immediately afterwards acceded thereto), *viz.* "That we do "not consider or acknowledge the Rev. *John Steward* "as minister of the congregation since the 23d of *May* "last. That his continuing to officiate since that time "is against the wishes of the trustees and subscribers, "and a violation of the terms on which he was invited. "That we have reason to suppose a change has taken "place in his sentiments, which, together with his time "having expired on the 23d of *May* last, it is not the "wish or inclination of the trustees to renew the con-"nexion. That he be immediately informed of this "determination, and that he be requested to leave the "chapel, dwelling-house, and premises, without delay. "But in order that he may not complain of any ille-"gality or unfairness, it is resolved that he be requested "to supply the congregation for a term not exceeding "three months, and that he be remunerated for his "services during that time." That such resolutions were afterwards communicated to *Steward*, accompanied with an intimation from the trustees that the same had been passed in the expectation that he would not, during his stay, preach any doctrines objectionable to the congregation: but he nevertheless did preach doctrines objectionable to the congregation, and refused, at the expiration of the time therein mentioned, to give up the occupation of the dwelling-house, or to desist from acting as minister, and continued, in defiance of the remonstrances and exertions of the trustees, to live in the said dwelling-house, and to officiate as such minister,

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and that he still continued so to do. They admitted that, since the expiration of the three months, he had not received, and insisted that, from that time, he was not entitled to receive, the emoluments of the office. They denied that *Mander*, as sole surviving trustee, was entitled to the possession of the premises, and the receipt of the annual income thereof. They denied that, according to the custom established, and to the original trust, no new trustees could be chosen without the consent of all the continuing trustees, it being expressly declared by the deeds that the act of the major part should be binding; and they insisted that *Mander* must be considered (more especially by reason of his having permitted the defendants to remain in the undisturbed possession for twenty-three years, and more, from *January*, 1793, to *September*, 1816,) to have assented to their nomination as trustees; and they therefore also insisted on the deed of 9th *January*, 1793, as a legal conveyance.

They did not know that the intention of the donors was to promote the belief of the Holy Trinity, no such intention being expressed in the trust-deeds. They admitted that while they (the defendants) were in possession of the meeting-house the doctrine of the Holy Trinity had not been taught there, except by the plaintiff *Steward*, who, after having for three years preached and inculcated the Unitarian doctrine, in or about the beginning of *October* then last (for the first time, as the defendants had been informed,) began to preach and inculcate the doctrine of Trinitarianism. They said that they (the defendants) were not, each of them, of exactly the same religious opinions: but, although of different persuasions, they all believed in the existence of God, and the propriety of worshipping and serving God, and insisted that the question as to their religious

religious belief was irrelevant to the matter in dispute in the cause, and that the intention of the persons endowing the chapel was, that it should be a meeting-house for the worship and service of God, and for the benefit of Protestant Dissenters, without regard to any particular tenets.

The answer went on to state, That *Steward* was originally invited by a letter from the said four defendants and the subscribers, to the following effect:—"To "the Reverend Mr. *Steward*. We, the undersigned "trustees and subscribers of the Dissenting meeting-"house in *St. John's Street*, *Wolverhampton*, do hereby "invite you to become our minister for the period of "three years from the time you commence your duties "among us. *Wolverhampton*, 5th *April*, 1813." That, after receiving the same, *Steward* informed them that he was much pleased that the invitation was for only three years, and, shortly afterwards, wrote and sent to them an acceptance of such invitation, addressed "To the trustees and subscribers" of the said meeting-house, wherein he expressed himself (among other things) to the effect following:—"Christian Friends, I accept "the invitation you have given me, with cordiality. "*John Steward*."—The four defendants admitted, that, about the 20th of *October* then last, they endeavoured to get possession of the meeting-house and school-room and, (in consequence of his not acceding to the condition annexed to his prolonged invitation, but having, in violation thereof, preached religious doctrines objectionable to the whole congregation), to exclude *Steward* from the occupation thereof, and insisted that they were justified in so doing. They, in like manner, admitted their having affixed new locks and bolts to the gates, as mentioned in the information, but said, that, on the 20th of the same month, *Mander* (together with

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with other persons hired for the purpose) did, in the presence of *Steward*, break open the meeting-house, and take possession thereof, and had, ever since, unlawfully retained possession thereof; that he instigated *Steward* to continue to preach there, and informed him that he would protect him in so doing; that, therefore, *Steward* continued still to preach, though he had no authority, and, in consequence thereof, all the persons who had theretofore frequented the meeting-house, and subscribed to its support, had withdrawn therefrom, and ceased to attend the same.

The answer further stated, that, on the 20th of *January* then last, *Joseph Guy*, a Dissenting minister, was duly elected, nominated and appointed by the said four defendants, (as such acting trustees), with the unanimous consent of the congregation theretofore attending the meeting-house, and of the subscribers to the support thereof, in the manner prescribed by the said deeds, and especially the deed of 1701, to be the minister and preacher of the said meeting-house, and insisted that he thereupon became entitled to officiate in the said meeting-house, and to have possession of the dwelling-house belonging thereto, as well as the rents, issues, and profits of the trust premises; submitting that, under these circumstances, the said *Joseph Guy* was a necessary party to the suit.

The defendants therefore insisted, that they ought not to be restrained from proceeding at law to obtain possession of the premises. They also insisted that *Mander* ought to be declared by the Court to have abandoned his trust, and to have given up the same, and to be compelled forthwith to make and execute proper conveyances of the premises to the four defendants, and such new trustees as they might appoint; that he was not

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not entitled to have the title-deeds, the possession of which they (the defendants) admitted; and, generally, that the plaintiffs were not entitled to any part of the relief prayed.

The plaintiffs now moved for an injunction to restrain the defendants from further proceeding at law in the ejectment brought by them, with another, against the said *Benjamin Mander* and *John Steward*, for the recovery of the meeting-house and premises in the pleadings mentioned, and from all other proceedings at law to recover possession thereof, until the hearing.

Sir *Samuel Romilly*, *Hart*, *Shadwell*, and *Ching*, in support of the motion.

That institutions of this nature are properly charities, calling as such for the interference and protection of this Court, in cases of abuse, has been long completely established, and lately recognized in *The Attorney-General* v. *Fowler*. (*a*) The minister of such an institution, where there is an endowment, is entitled to his mandamus to be admitted, or restored, to the office; as in *The King* v. *Barker* (3 Burr. 1265.); *The King* v. *Jotham* (3 T. R. 575.) The question now before the Court is one which, in this view of the nature of the institution, there can be no doubt of the Court having authority to decide, *viz.* Whether the trustees can be suffered to divert the charity from that which was its original and only proper object, by devoting it to another, which could not, by any possibility, have been within the intent of the founder.

It

(*a*) 15 Ves. 85. And see *Attorney-General* v. Lord *Dudley*, Coop. 146.

The principle of these cases, it is conceived, can be no other than that which was laid down by Lord *Mansfield*,

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It must be admitted, that nothing appears, as to this object, upon the face of the trust-deed: but the very silence of that instrument is enough to establish the propo-

in *Evans*'s case (*a*), when, speaking of the Toleration act, he is reported to have said, that non-conformity is rendered by that act "not only innocent but lawful," and that the protecting clauses of the statute "have put it, not merely under the connivance, but under the protection of the law—*have established it.* For nothing can be plainer, than that the law protects nothing in that very respect, in which it is, at the same time, in the eye of the law, a crime. Dissenters, by the Act of Toleration, therefore, are restored to a legal consideration and capacity." "The judgment of the Court of Delegates," observes Dr. *Furneaux*, in his first letter to *Blackstone* upon the subject of the case referred to, "was grounded entirely on this opinion, That the Toleration act removed the crime as well as the penalty of mere Non-Conformity." And again, "The more the idea of *legal protection* is examined, the more will it appear to justify the strong expression of Lord *Mansfield*, concerning the Dissenting worship—That it is *established.* If the justices of the peace at Quarter-Sessions, or the register of the Bishop's

(*a*) *Evans* v. *The Chamberlain of London.* (Appendix to *Furneaux*'s Letters. 2 Burn's Eccl. Law 207. And *Harrison* v. *Evans*, (in Error) 6 Bro. P. C. 181.)

"There never was a single instance, from the Saxon times to our own, in which a man was ever punished for *erroneous opinions* concerning rites and modes of worship, *but upon some positive law.* The Common Law of *England*, which is only common reason or usage, knows of no prosecution for mere opinions. For *atheism*, *blasphemy*, and *reviling the Christian religion*, there have been instances of persons being prosecuted aud punished upon the Common Law: *but bare non-conformity is no sin by the Common Law.*" *Per* L. C. J. *Mansfield*, 2 Burn, 218. And see Mr. J. *Foster*'s opinion on the same case, ib. 209.

proposition contended for, because the doctrine now preached, and attempted to be supported in that place of worship, was, at the time of its foundation, illegal; being expressly excepted out of the provisions of the Toleration Act (1 *W.* and *M.* c. 18.) then recently passed; an act framed for the indulgence of Dissenters in all forms and modes of worship then in use among them; the enactments of which the great body of Dissenters themselves had a principal part in drawing up; and yet, so far were they from considering the doctrine of Unitarianism as among the objects of the protection then sought by them, that the 16th section (which received their general assent and sanction) provides, "That any "person, in his preaching or writing, denying the doc-"trine of the Blessed Trinity, shall be excluded from "every benefit and advantage thereof." At the time of the foundation of this charity, therefore, Unitarian worship was neither legal nor tolerated (*a*); and it was con-

Bishop's Court, should refuse to register a Dissenting place of worship, a *mandamus* always is, and must be, granted, upon application, to compel them to the discharge of their duty." It is upon the same principle, that, in *The King* v. *Barker* (Burr. 1265.), Lord *Mansfield* observes, "A dispute, *who shall preach Christian charity*, may raise implacable feuds and animosities, in breach of the public peace, to the reproach of government, and the scandal of religion; and to deny this writ would be putting Protestant Dissenters, and their religious worship, out of the protection of the law. *The case is entitled* to that protection, and cannot have it in any other mode than by granting this writ."

(*a*) Surely this does not follow. The *worship* of the Supreme Being according to Unitarian principles was never illegal; and it is believed to be an historical fact, that many Unitarian congregations qualified under the Toleration Act, and were protected by that Act in their *worship*. And see *post*, p. 383. note.

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sequently impossible that any public place of worship could exist in the eye of the law, which was expressly framed for preaching that doctrine. Can it then be contended that the trustees of this institution have the right of capriciously displacing a minister who happens to preach the contrary doctrine, which alone the law recognizes and allows to be promulgated? and when, also, it appears to have been by no means the intent of the founder that the trustees should have such a power, or that the minister should in any case be liable to removal, except for neglect of the duties of his situation, or immorality of conduct? But even if it were possible so to contend, had the purposes of the institution in other respects been adhered to, it could not be said that the present trustees retain the right which is so imputed to them, since the number, which ought to have been kept up to twelve, has been suffered to fall to five only, and no authority whatever is vested but in a majority of the whole constituted list. Besides which—to say nothing of its being contrary to every principle of public policy, as recognised by the practice of the Court, to permit a person sustaining the character of a spiritual pastor, or teacher, to be so dependent on the will of those whom he ought to direct, as he must be, if holding less than an estate for life in the office he fills—in this case, the three years which are represented by the defendants as the term of probation for which Mr. *Steward* was invited to preside over the congregation, having expired some months before any complaint made, or any measures resorted to for his expulsion, the trustees must be taken to have acquiesced in his continuance, and, upon their own shewing, to have no longer retained any power of removing him, except upon one of the general grounds already adverted to, neither of which appears here to have existed.

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The proposition was then more strongly stated and maintained by *Shadwell*, that the publicly impugning the doctrine of the Trinity is an offence indictable at Common Law; therefore, not to be taken as within the contemplation of the founder of this institution; or, if considered as part of its system, that the system itself was not entitled to the recognition, much less to the protection, of a Court of Justice.

By *Hale* C. J. in the case of *The King* v. *Taylor*, (1 Vent. 293.) it is said, that "Christianity is parcel "of the laws of *England*; and, therefore, to reproach "the Christian religion is to speak in subversion of the "law." And, to the same purpose, Lord *Raymond* in *Woolston's Case*, (*The King* v. *Woolston*, 2 Stra. 834. Fitzgibb. 64.) referring to this doctrine of *Hale*, says that "Christianity, in general, is parcel of the Common "Law of *England*; and, therefore, to be protected by "it." (*a*)

The

(*a*) The above are the cases commonly referred to as establishing the principle of interference by Courts of temporal jurisdiction, in cases of the third of those classes into which offences against religion have been divided by the text writers, *viz.* offences against God and religion *in general*, commonly called *Blasphemy* or *Profaneness*. The other two are *Heresy*, of which (I apprehend) it is certain that the Common Law has no cognizance; and *Nonconformity*, the crime of which (as has been shewn), was taken away by the Toleration Act. (*a*)

The

(*a*) The term *Blasphemy* does not seem in itself to define any particular species of offence. *Heresies* even, of which the Common Law had no cognizance, were so styled. Its proper meaning, when used at Common Law, appears to be *profaneness* against the general principles of religion and morality.

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The question then arises, What is Christianity in the eye of the Common Law—that is, in the sense of that which

The case of *The King* v. *Taylor* was of "an information in the Crown Office for uttering blasphemous expressions, such as that Jesus Christ was a bastard, religion a cheat, &c. *Hale* said, that *such kind of wicked blasphemous words* were *not only* an offence to God and religion, *but* a crime against the laws, state, and government, and, *therefore*, punishable. For, to say religion is a cheat, is to dissolve all moral obligation, whereby civil societies are preserved; and Christianity is parcel of the law; and therefore, *to reproach the Christian religion*, is to speak in subversion of the law." And see the report of the same case, 3 Keble, 607—621. where it is added, "these words, *though of ecclesiastical cognizance*, *yet*, that religion is a cheat, tends to the *dissolution of all government*, and *therefore* punishable here."

The power of the Temporal Court was called in question in *Curl*'s case (2 Stra. 789.)—An information for printing and publishing an obscene book. The defendant moved in arrest of judgment, on the ground that, as an offence *contra bonos mores*, it was of ecclesiastical cognizance, but no libel for which he was punishable in the Temporal Courts; and Lord C. J. *Raymond*, in deciding the question, said, "If it reflects on religion, virtue, or morality—if it tends to disturb the civil order of society—I think it is a temporal offence."

Then followed the case of "*The King* v. *Woolston* (2 Stra. 834.), for blasphemous discourses, denying the miracles of our Saviour." And there the Court "would not suffer it to be debated whether to write against Christianity *in general* was not an offence at Common Law, punishable in the Temporal Courts, it having been so settled "in the former cases." They desired, however, it might be taken notice of, that they laid their stress on the word *general*, and did not intend to include disputes among learned men upon controverted points." In the Report of the same case in *Fitzgibbon*, 64., L. C. J. *Raymond*, after referring to Lord *Hale*'s opinion, in *Taylor*'s

which is here considered as entitled to the protection of the law, making it criminal to speak or write against it?

case, abovementioned, is made to say he would have it taken notice of "that we do not meddle with any difference of opinion, and that we interpose only where the very root of Christianity itself is struck at, as it plainly is by this allegorical scheme, the New Testament, and the whole relation of the life and miracles of Christ *being denied.*"

See, as to the doctrine of this case, *Starkie*'s Law of Libel, 495, 496.; and, on the subject of the prosecution of *Woolston*, the preface to *Lardner*'s "Vindication of the miracles of our Saviour," against his attacks.

As to this head of offence, in general, the division made by the text-writers should be remembered; *viz.* into the following heads:—

1. Denying the being or providence of God, and contumelious reproaches of Christ, (for which we are referred to *Taylor*'s case, above noticed.)

2. Profane scoffing at the Scriptures, or exposing any part thereof to contempt or ridicule.

3. Impostures of religion, &c. (for which *Nailor*'s case is cited.)

4. "Certain immoralities;" as tending to subvert all religion or morality, which are the foundation of government.

5. "Seditious words, in derogation of the established religion," as tending to a breach of the peace.

(See *Hawkins*—Pleas of the Crown, c. 5.)

To the same effect are the following: "Blasphemy consists in the denial of the being, attributes, or nature of, or uttering impious and profane things against God, or the authority of the Holy Scriptures. But it is only committed by uttering such things in a scoffing and railing manner, out of a reproachful disposition in the speaker, and, as it were, with passion against the Almighty, rather than with any purpose of propagating the irreverent opinion. The like sentiments, uttered dispassionately, are still criminal, but constitute a crime of a different sort, rather heresy, or apostasy, than blasphemy." Hume on Crimes, Vol. II. c. 518.; and, in support of the same doctrine, the writer cites *Voet* and *Clarus*.

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it? And, to answer that question, we must trace the history of our religion back to the period antecedent to the Reformation, when the religion acknowledged by law was the religion of the Church of *Rome* as esta-

Aikenhead's case, the single instance to be found of capital judgment for blasphemy under the Scotch statutes, tends strongly to confirm this doctrine. The indictment there was said to be founded "on the law of God, the law of this and all other well-governed realms, *and specially* the 21st Act, 1st Parl. Ch. 2. and the 11th Act, 5th Sess. of 1st Parl. Will. III.;" and it charged (inter alia) that the pannel had called the Old Testament Ezra's Fables, (profanely alluding to Æsop's Fables,) Christ an impostor, who had learned magic in Egypt, &c.; that he rejected the mysteries of the Trinity and Incarnation; maintained that God, the world, and nature, were the same thing; preferred Mahomet to Jesus; hoped he should see Christianity extirpated, &c. The Court found "*Cursing or railing upon* any of the Persons of the blessed Trinity relevant to infer the pains of death; and *the other crimes* likewise relevant to infer an arbitrary punishment;" and the Jury finding that the pannel had railed against the first, and also cursed and railed upon the second, Person of the Holy Trinity, and *the other crimes* in the libel proven, the Court adjudged him to be hanged, and he was executed accordingly. (*Maclaurin*'s Crim. Cases. 12.)

The remarks of *Hume* (Hume on Crimes, cit. sup.) on this case are, that "it appears to have been tried with a rigorous disposition, not on the part of the Court, but of the Assize, who found the pannel guilty of railing at and cursing Christ, without proof of his having *directly* done so, and only *upon inference* from opinions occasionally vented; whereas in the trial of crimes which consist in uttering words, and are made capital by statute, it seems to be the sounder, as it certainly is the more humane construction, that *the thing itself* must be said *explicitly* and *directly* in such a palpable and open form that every one who hears the words shall know the law to be infringed."

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blished by successive councils, all of which had uniformly recognized the doctrine of the Trinity as its most essential ingredient. (*a*) The Reformation itself effected many

(*a*) The Statute 1 *Eliz.* c. 1. applies to offences of the first class, or those which come under the denomination of "Heresy :" and by that statute it is declared, that no tenets shall be considered heretical by the High Commission Court (thereby established) but those which had been settled to be so, first, by the words of the Canonical Scriptures ; secondly, by the *first four general councils*, or such others as have only used the words of Scripture ; or, thirdly, which should thereafter be declared such by Parliament with the assent of the clergy in convocation. Now, if this statute be taken as defining what is Christianity by the Common Law of *England* (as it seems to be that which is alluded to in the above argument), then the denial of the Trinity can be considered as an offence against the Common Law, only as coming within one of the two first of the above descriptions, *viz.* as settled to be heretical, either by the words of the Canonical Scriptures, or by such of the general councils as aforesaid. If by the former, it may be asked, who is to settle the question, when the parties asserting and denying the doctrine of the Trinity equally appeal to the Canonical Scriptures in defence of their respective opinions ? The High Commission Court is abolished, and the authority given to that Court in matters of heresy is extinct, as well as the crime of heresy itself. The only ground (as is settled by the cases referred to in the preceding note) upon which the magistrate can now interfere to restrain or punish any principles relating to religion is on account of their tendency to the subversion of government, or those injuries to social order which fall under the denomination of a breach of the peace. If his interference is permitted in such cases upon any other principle, there is an end of religious liberty. But if that which constitutes the assertion of the doctrine in question to be an offence against common law be the authority of councils, then there is

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many important changes both in the forms and doctrines of Christianity, but left that doctrine untouched, which still constitutes the main article of belief in our established religion, as much as it was in the days of Popery. Then how has the question been affected by subsequent acts of the Legislature? The first which has any bearing upon it is that taking away the writ "*De Hæretico* "*Comburendo*," (29 *Car.* II. c. 9.) but which, by abrogating certain proceedings in the Ecclesiastical Court in matters of heresy, only leaves the Common Law more absolute and unrestrained in the exercise of its functions. Then follows the Toleration Act (1 *W.* & *M.* c. 18.), which, as already observed, leaves the law as to this description of Dissenters precisely where it found it; and then the statute (9 & 10 *W.* III. c. 32.) "For the more "effectual suppressing blasphemy and profaneness," the strong expressions of which, both in the preamble and in the passage immediately introductory to the enactment, sufficiently inform us, both as to the public denial of the doctrine of the Trinity being an offence in the eye of the law, and as to the degree of criminality which the

is no reason for restraining the authority of councils to the heresy of denying the Trinity, and not extending it to every doctrine which the same councils have pronounced to be heretical. Lord *Coke* observes upon this act of Parliament, "that no statute standeth now in force, and at this day no person can be indicted or impeached for heresy, before any temporal judge, or other that hath temporal jurisdiction." The High Commission Court was abolished by 16 Car. I. c. 11. But by its abolition little would appear to be gained to the cause of religious liberty, if (as seems to be the unavoidable consequence of admitting the validity of this argument) the King's Courts are to be considered as now invested with precisely the same authority.

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law attaches to it. (*a*) The late act (53 *Geo.* III. *c.* 150.) only repeals the penal clauses of the statute last mentioned,

(*a*) By the statute 29 *Car.* 2. c. 9., the writ "De Hæretico comburendo" was taken away, and the offence of heresy is considered, and (I believe) admitted by all, to have been then left subject only to ecclesiastical censures.(*) The statute 9 & 10 *W.* 3. c. 32. revives the temporal jurisdiction over that species of heresy which consists in the denial of the Trinity; and the preamble, and introductory part of the enacting clause of that statute seem to be treated in this part of the argument as defining, by legislative authority, the supposed offence at common law. That statute, however, has been repealed by the 53d of the King; and it is conceived that heresy, considered as a civil offence, has expired with it. Supposing this to be the case, then the denial of the Trinity, if still a crime at common law, must be so by reason of its falling under the head of blasphemy or profaneness. But the ground upon which offences of that description are cognizable by the temporal courts is their tendency to subvert, or to disturb, the security of civil society. And then, if the language of statutes is to be taken as declaratory of the law by inference only from the expressions contained in them, the statute of 19 *G.* 3. c. 44., extending the benefit of the Toleration Act to such persons as shall sign "a declaration of their belief that the Scriptures contain the revealed will of God," when coupled with the late statute admitting Unitarians to the like benefit, may be considered as containing the sense of the Legislature upon that which is essential to the security of the state in matters of religion. And, on the other hand, if statutes, made for a particular purpose are, though repealed, to be taken as declaratory of legislative intendment,

(*) The Toleration Act suspends all ecclesiastical censures against the persons protected by it—so that even the ecclesiastical jurisdiction over heresy is now done away with.

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tioned, and repeals also so much of the Toleration Act as provides "that the same shall not be construed or "extend to give any ease, benefit or advantage to per-"sons denying the Trinity;" that is, it virtually extends to that class of persons the benefit of the repeal of certain penal statutes in that act expressly mentioned, which applied to Dissenters in general. But this also leaves the common law offence as it was, and can neither be construed directly, nor by implication, as having any reference to it or giving any relief against its consequences.

In further support of this opinion, the Court should be informed that, at this moment, prosecutions are actually pending against individuals for impugning the doctrine of the Trinity, as an offence at common law (*c*).

there can be no use at all in repealing them. In some of the statutes repealed by the Toleration Act, non-conformity is stigmatized as *felonious*. Will it therefore be contended that, although those statutes are repealed, yet their language must be taken as declaratory of the common law, and that non-conformity therefore not only was then, but remains to this day, a felony?

See also what is said by Mr. Justice *Ashhurst*, in *The King* v. *Annett*, Blackst. Rep. 395., with respect to the ground upon which the Christian religion is said to constitute part of the law of *England*. And see, in general, the articles "Heresy" and "Profaneness," 2 Burn's Eccl. Law. 304., 3 Burn's Eccl. Law, 215. and the references to *Hawkins* and *Gibson*. See also, with respect to the law of *Scotland*, which stands on precisely the same footing, Hume on Crimes, under the same heads as above.

(*c*) The prosecution against Mr. *Wright* of *Liverpool*, the only one, it is apprehended, which could be intended to be here referred to, has since been abandoned.

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Upon the whole, it is therefore evident that the founders of this institution, in expressing it to be intended "for the worship of Almighty God," must be taken to have comprehended the doctrine of the Trinity in the worship designed by them. And, if any further argument in support of this proposition were requisite, it might be found in the ulterior provisions of the deed in question, which devotes the charity-funds to other purposes, in case that for which they were first intended should ever cease to be tolerated,—an expression which cannot be understood as applying to the preaching of doctrines which the founders must have known, at the time of using it, to be at that very moment out of the pale of toleration.

The Solicitor-General, Benyon, and *Phillimore*, for the defendants.

Much of the discussion which this case has produced is irrelevant to the question at issue, and not arising out of or in any way connected with the pleadings. The real points of the case lie in an extremely narrow compass, and are these:—Whether a majority of the trustees shall not be held to have the management of the trust, so long as they act in conformity with, or not in direct violation of, the express intent of the founder, —and, whether a trustee, who has not acted for thirty years, shall, in contradiction to the express directions of the founder, be considered as having any longer an interest in the administration of the charity.

What then is the object of the original trust? It is expressed, in words as general and comprehensive as can be imagined, to be "for the worship and service of "Almighty God," not containing a single iota as to the form of worship or the doctrines to be inculcated. Then,

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if no particular form of worship or mode of faith is prescribed, how can it become a part of the province of this Court to impose either? The question as to the change of opinions in the minister, whom the majority of the trustees had elected, does not arise. They had elected him for three years, and had a right so to elect him. At the expiration of the term for which they elected, they are desirous to remove him; and what restriction is there on his removal? It does not even appear that his removal is for the cause alleged, *viz.* his change of doctrine. The defendants themselves state that they are by no means unanimous in their opinions on points of doctrine,—holding only one tenet in common; *viz.* that of absolute freedom in matters of opinion. All they now insist upon is the liberty of choice; and nothing that has been said at all tends to limit their powers in this respect, as derived from the same instrument to which all the rights of the minister are in like manner to be exclusively referred. Suppose it granted, that the doctrine of Unitarianism, being a doctrine not tolerated by law at the time of the foundation of this charity, cannot be taken to have been in the contemplation of the founder; it is incumbent on the other party to shew clearly to the Court that the removal of Mr. *Steward* by the defendants is occasioned by their intention to have these doctrines exclusively preached,—an inference which cannot strictly be drawn from any thing that appears on the pleadings. And again, on the other hand, suppose this inference to be established, the point which remains, *viz.* as to the legality of the doctrine in question, is one upon which this Court has no jurisdiction to decide, which cannot be discussed before it, but must be removed to another tribunal.

If, then, as Mr. *Mander* alleges, the trust has been misapplied, how is it consistent with his character as trustee

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trustee to have remained silent for the last thirty years during which this misapplication has been subsisting, and what right can he have to expect that his complaint on the subject shall now be regarded? Since the year 1782 he had seceded from the congregation upon the avowed principle of his dislike to the doctrines generally inculcated there; and now, in 1817, he comes forward to complain of those doctrines being preached. Admitting that he has not by this desertion altogether renounced his character of trustee, his conduct in the business has at least been such as to make the Court extremely cautious in listening to his representations.

The short ground of defence to this application is, that the party making it has not shewn on the face of the pleadings that the doctrines preached at this chapel are contrary to law, and all that has been said to this effect in argument resolves itself into the principle laid down in two cases which have been cited, *viz.* that the law does not allow of the preaching of doctrines contrary to Christianity — these doctrines not having been shewn to be contrary to Christianity — and the question, whether they are so or not, being one into which it is impossible for this Court to enter.

If Christianity be part of the common law, and if that which the law understands by Christianity be the religion of the country at the time of the Reformation, so far as the doctrines of that religion remained untouched by the Reformation; then is, not only the doctrine of the Trinity, but every doctrine of the Church of England, an essential part of Christianity so considered; and the impugning of any one — the least important of those doctrines — is as much an offence indictable at common law as the denial of the Trinity. According to the argument we have just heard, therefore, this is the situation

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tion in which not only Unitarian Dissenters, but all Dissenters from the Church of England in any, the minutest, of its doctrinal points, at this day stand—liable to this undefined species of prosecution and punishment; and thus the Toleration Act is a nullity—the late act of his Majesty a mockery and an insult—and the present age, with all its boasted advances in liberality and illumination, is no better in these respects than the worst of those that have preceded it. On the contrary, however, the principle which has been relied upon in support of this monstrous and dangerous doctrine, when properly understood, is no more than this—that the law will restrain and punish all open and public attacks upon religion—upon the authority of the Scriptures, and the Divine mission of the Founder of Christianity—because the belief in religion, so construed, constitutes the only binding obligation among men, and its denial tends to the subversion of all law and order in society. This is the principle, even, which is laid down in express words by the very cases that have been appealed to in behalf of a notion entirely different and altogether unwarranted—cases, which, if they are but read instead of being cited generally, will be found most carefully to guard against the further extension of the principle.

But the case does not really turn upon this question; nor is the point in any manner raised by it. It is enough to shew that it was competent to the trustees to choose the minister either for life, or for any limited period—that they did in fact exercise this power by inviting Mr. *Steward* to undertak the office for the term of three years—that he accepted their invitation—and that, the term being expired, the trustees are now desirous of resuming the exercise of their power by appointing another minister to supply his place. And it is for the other

other side to shew, (which they have not attempted to do), that *Mander* and *Steward* have jointly a paramount right of preventing the general wish of the entire congregation.

It was also objected, that, according to the practice of the Court, the injunction moved for, *viz.* to stay all proceedings in the action, was too general, and plaintiff in equity, after declaration, being entitled to the injunction to stay execution only, and not trial—at least, in the first instance.

Sir *S. Romilly* in reply.

The question is, What is proper to be done by the Court?—it being quite clear that something must be done to put an end to the discord at present prevailing in this congregation. Whether the defendants are to be allowed to recover four undivided fifths of the trust property—it being certain that they are entitled to no more, even upon the case made by themselves—and thus to perpetuate the existing confusion?—Or whether the Court will not see fit to grant the injunction in order to prevent so hopeless a train of consequences—and whether the injunction, if granted, must not, for the same reason, extend not only to stay execution, but trial also? It cannot be seriously contended that *Mander*, by discontinuing to act in the trusts, when he thought the objects of the charity mistaken or disregarded by his co-trustees, has virtually abandoned them. Being at variance on these important points with the majority, he could not, consistently with his duty as a trustee, or with the obligations of conscience, have otherwise acted. The question on which he differed from the rest now comes directly before the Court for its decision; and still less can it be pretended that the Court has nothing to do with the point of *doctrine*, that

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that being in fact the true and only question it is called on to determine, and which is strictly within its ordinary jurisdiction, *viz.* what is the nature of the trust, and what was the intent of the foundation? Indeed, the question as to *Mander*'s own conduct, in so long discontinuing to act in the trust, is immediately and necessarily dependent upon it; since the very words of the deed, "where and so often as any of the trustees should "happen to die, or desert or forsake the congregation, "and change or become of any other religion or per-"suasion contrary to and different from the said congre-"gation," must lead the Court to enquire and determine what was the religion or persuasion, the profession of which was essential to the congregation, the desertion or abandonment of which is thus contemplated. For, if the congregation has changed or become of a different religion or persuasion from that which is here contemplated, it has ceased to be *the* congregation which the trustee is supposed to desert or forsake—and the very expressions are such as it is impossible to apply to the conduct of a person who remains fixed in his persuasion, being the same which the congregation originally professed, and has since abandoned. Besides, if the Court is to see that the trust is carried into effect, how can it do so without first seeing what the trust is which it is to have carried into effect? And how can the defendants avoid this necessary consequence? The majority of the trustees have no power under the trust deed to alter or divert the purposes of the institution, however they may be entitled, as such majority, to regulate the charity agreeably to such purposes. Then the question directly arises, whether those purposes have not in fact been altered, and the institution diverted from the intent of its founder. In 1701, land was settled, and a meeting-house built for the service and worship of God, and there can be no question, in a court of justice, that by that expression is meant the

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the worship and service of God according to the Trinitarian doctrine, because the opposite doctrine with respect to the nature and character of the Supreme Being had at that time no legal existence, being expressly excepted out of the provisions of the Toleration Act. A change of opinion has since taken place in the majority of those who are entitled, as trustees, to the management of the trust—but does this change of opinion at all alter the nature of the trust itself?—and are they themselves not guilty of that very desertion and abandonment of the trust which they impute to their co-trustee, when they would divert the institution to purposes which are already shewn to be altogether foreign from, and directly hostile to, the purposes of the foundation? And is not this still more manifestly the case when the purposes to which they would so divert this institution are, as they have been shewn to be, illegal, and such as this Court could not decree to be carried into effect, even in the case of an institution expressly founded for such purposes?—For, the Court could no more carry into effect a trust for promoting Unitarianism, than it could carry into effect a trust for the preaching of Judaism; and this it has been expressly decided that the Court will not do, in the case of *Da Costa* v. *Depaz*. (*a*) Nor is the one purpose at all more contrary to law, and incapable on that ground of being

(*a*) Ambl. 228. See 7 Ves. j. 76. This case of *Da Costa* v. *Depaz* serves strongly to exemplify the distinction before (p. 377, note,) taken between the act of *worship* and the inculcation of *doctrine*. In that case an institution for teaching the Jewish law was held bad; but Synagogues are protected; and, in the late case of *Lazarus* v. *Simmonds* (at *Nisi Prius*, *May* 6, 1818,) I am informed that Mr. Justice (now Lord Chief Justice) *Abbott* would not hear of any argument to the contrary.

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supported in a court of justice, than the other; and this has been too clearly established in the course of the preceding argument to render it at all necessary for me to enter again upon the discussion. At the same time it is a very different thing to say that, at this time of day, a prosecution could be maintained, even if it were not too illiberal to be attempted or thought of, against any persons or description of persons, for holding these or any other religious opinions in particular. But there are many acts for the establishment or protection of which a Court will refuse its interference, even on the ground of illegality, and yet which are incapable of sustaining a criminal prosecution; and this, which has been called a common law offence, and may in some sort be so considered, of publicly denying the doctrine of the Trinity, may well enough be ranked in the number of such acts as above referred to (*a*).

(*a*) If the notion of the denial of the Trinity being an offence indictable at common law were abandoned, it would then be difficult to say upon what ground it can be considered as an offence at all, unless nonconformity (notwithstanding the opinion of Lord *Mansfield* and the other judges in *Evans*'s case) be itself an offence; and, if that be so, why are the Courts to interfere for the protection of any class of Dissenters, or of any Dissenting establishment? But, that the Courts do so interfere, and are compellable so to interfere, in the case of Dissenters not impugning the Trinity, is established by the cases referred to at the beginning of this argument. Besides, there seem to be other reasons for questioning whether the application here made to the case in point from other cases in which the Court refuses its interference on the ground of the illegality of acts which are nevertheless not indictable will bear a close investigation. As, for example, the trading with an alien enemy — for the illegality of that act depends on positive prohibition, which cannot be predicated of the case before us.

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Another point which was made at the opening of this cause, but has been barely noticed by the other side, is nevertheless of no light moment, *viz.* whether these trustees were competent to appoint a minister only for a limited term,—as for three years,—and not for life. This, as a general proposition, may fairly be contended to be inconsistent with the intent of institutions of this description, and at variance with the principles of good policy. In the case of schools, wherever the trustees have endeavoured to keep the master dependent upon them by a limited appointment, although it may be perhaps in many such cases greatly desirable that they should possess such a controul, the Court has uniformly resisted the introduction of any such limitation. But in the case of a spiritual teacher, who ought to be the director and guide, in matters of religion, of the congregation committed to his charge, so long as he acts conformably with the designs of the foundation, it would be still more obviously contrary to reason and policy that he should be placed in a condition of subserviency to the arbitrary dictates of any individuals whatsoever. Accordingly, the policy of our church establishment has always been to make the minister independent of the caprice of his hearers, and to give him a freehold interest in his sacred office. And I am not aware of any single instance in which a court of justice has ever acted upon or admitted the contrary principle.

The LORD CHANCELLOR.

There are so many considerations in this case of great importance, not only to the individuals concerned in the controversy, but to the public at large, that I should not execute my duty in stating any opinion I may at this moment entertain, as final and conclusive, until after I shall have had an opportunity of reading the bill and answer.

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In cases of charity, the Court is not bound by the strict rules of practice, as with respect to granting an injunction, whether common or special, to stay proceedings at law, but will act according to what the justice of the case seems to require, so as to save the parties unnecessary expense and delay.

The questions that have arisen are many and various. If it were a case that presented nothing more than the title of the parties,—a Protestant Dissenting Congregation—to have certain trusts established, and seeking to have them administered by this Court, there would be no difficulty attending it; and, in considering what is to be done, I do not think that we should have occasion to disturb ourselves with any question on the practice of the Court as to this being the case of a common or special injunction, and so forth; because, taking it to be a trust, in the nature of charity, for religious purposes, I conceive that the Court is in the constant habit, in such cases, of saying, that, provided it sees any way of deciding the points at issue, it will not allow the parties to go to trial, but will itself find the means of putting the matter into a course which may save all the expense of such a proceeding. And, if it should turn out to be clear, upon the bill and answer, that a certain portion of the legal trust estate is vested in the plaintiff, and a certain other portion in the defendants, I take it to be quite within the compass of the Court's jurisdiction to say, I will put the parties exactly in the same condition as to the point at issue, as if there had been a trial, judgment, and execution at law. If, however, this be any thing more than a mere suit for the administration of a trust, where it is clear who are the parties having the legal estate, and what are the trusts which are sought to be administered, I must precisely understand the nature and extent of the questions, before I attempt the decision of them.

The Court is bound to administer trusts for the benefit of

It is represented that this is an institution for the benefit of a Protestant Dissenting congregation, consisting in the application of certain trust-property to the maintenance of a preacher to that congregation. It may

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may be stated that this Court is unquestionably bound to administer such a trust, and to administer it (as it should every other trust,) with all the expedition possible. But it must on the other hand be admitted, that these are not cases in which justice can always be administered with the promptitude which the parties desire; and, if the present be not the case of a simple trust, at its first creation, or if it be the case of a trust which has been rendered complex by the parties—by the acts of the trustees having the legal estate—by requiring the accession or consent of subscribers, or of the whole congregation, to their acts,—in short, if any of those various questions arise in it, which are of such frequent occurrence in cases of this description,—although it is very easy to apply to this Court for a remedy, it is rather more difficult to find out what is the remedy that ought to be administered.

Now, it is insisted, that this was, originally, a Protestant institution for the celebration of Divine worship—and, although thus generally expressed, yet it is also further insisted, that the very instrument creating the trust bears on the face of it evidence, that the worship intended to be celebrated was a worship consonant with the acknowledgment of the doctrine of the Trinity.—For, say they, the deed contemplates the possibility of the legislature, at some future period, making it unlawful to celebrate Divine worship in the mode thereby intended—which renders it evident that the mode so intended was not at that period unlawful—whereas the doctrine of those who impugn the Trinity was then an unlawful doctrine, being expressly excepted out of the provisions of the Toleration Act, and consequently could not be in the contemplation of that clause in the deed. On the other hand it is contended, that the late act, extending

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extending the benefit of the Toleration Act to persons impugning the Trinity, and repealing another act of *William*, which inflicted certain penalties on the offence, has removed the difficulty. Now, it is certainly true that the legislature has so done—it is also true that it has by the same act repealed a Scottish statute which (as I recollect) inflicted the punishment of death on the offence of denying the Trinity (*a*), and that it has, within the

(*a*) 53 *Geo.* 3. c. 160. s. 3. repealing the acts of the 1st. parl. of *Cha.* 2d. c. 21, and 1st. parl. of K. *Will.* sess. 5. c. 11. By the first of which, entitled

"An Act against the crime of Blasphemy," after reciting "that there hath been no law in this kingdom against the horrible crime of blasphemy," it is ordained, "That whosoever hereafter, not being distracted in his wits, shall rail upon, or curse, God, or any of the Persons of the Blessed Trinity—*or* whosoever hereafter shall deny God, or any one of the Persons of the Blessed Trinity, and obstinately continue therein,—shall be processed, and, being found guilty, shall be punished with death."

And by the second of the said acts, entitled

"Act against Blasphemy," the former act is confirmed, and it is further ordained, "That whoever hereafter shall, in their writing or discourse, deny, impugn or quarrel, argue or reason against the being of God, or any of the Persons of the Blessed Trinity, or the authority of the Holy Scriptures of the Old and New Testament, or the providence of God in the government of the world, shall for the first fault be punished with imprisonment, ay, and while they give public satisfaction in sackcloath to the congregation within which the scandal was committed. And for the second fault, the delinquent shall be fined in an year's valued rent of his real estate, and the twentieth part of his free personal estate, &c. besides his being imprisoned, ay, and while he make a fair satisfaction *ut supra*. And for the third fault, he shall be punished with death, as an obstinate blasphemer." The act goes on to commit the execution thereof, for the first fault,

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the very last week, passed an act having a similar operation on the laws respecting the same offence as they regarded Ireland (*a*)—but of this I am satisfied—that, in one house of parliament at least, it was never intended by these measures to do any thing that should alter or in any manner affect the common law. I do not, sitting here as a judge in equity, presume to say what is the doctrine of the common law as to the subject in question, nor what effect, intended or not intended by the legislature, these late acts may have upon it—but, if the common law remains yet unaltered, and if the impugning the doctrine of the Trinity be an offence indictable by the common law, it is quite certain that I ought not to execute a trust the object of which is illegal. The business of a judge is, not to consider what is the kind or degree of toleration which he would himself be inclined to extend, but what is that which the law has granted—not what he would do if the question were left to his own discretion in the exercise of his judicial authority—but what the legislature has authorised or forbidden.

It was not intended by the legislature, in passing the 53 G. 3. c. 160. to make any alteration of the common law respecting the objects of that statute.

The Court will not execute a trust, in its nature illegal.

fault, to all magistrates, &c. for the second fault, to all sheriffs, &c. and for the third fault, it commits the execution of the said act "to the Lords of his Majesty's Justiciary."

There is no instance of capital judgment on either of these statutes, except that of *Aikenhead* (before noticed); and only two of prosecutions—those of *Kinninmouth* and *Borthwick*,—in the first of which the prosecution was dropped, and in the other the pannel fled the country. (See *Hume* on Crimes, Vol. II. c. 518.)

(*a*) 57 *Geo.* 3. c. 70. repealing the excepting clause of the *Irish* stat. 6 *Geo.* 1. c. 5. and extending to *Ireland* the provisions of 19 *G.* 3. c. 44. and 53 *G.* 3. c. 160.

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Where a trust is created for religious worship, and it cannot be discovered from the deed creating the trust, what was the nature of the religious worship intended by it, it must be implied from the usage of the congregation. But, if it appears to have been the founder's intention, although not expressed, that a particular doctrine should be preached, it is not in the power of the trustees, or of the congregation, to alter the designed objects of the institution.

But there is another view in which the case should be considered—and it is this—that, where an institution exists for the purpose of religious worship, and it cannot be discovered from the deed declaring the trust what form or species of religious worship was intended, the Court can find no other means of deciding the question, than through the medium of an inquiry into what has been the usage of the congregation in respect to it; and, if the usage turns out upon enquiry to be such as can be supported, I take it to be the duty of the Court to administer the trust in such a manner as best to establish the usage, considering it as a matter of implied contract between the members of that congregation. But if, on the other hand, it turns out—(and I think that this point was settled in a case which lately came before the House of Lords by way of appeal out of Scotland—) that the institution was established for the express purpose of such form of religious worship, or the teaching of such particular doctrines, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members, "We "have changed our opinions—and you, who assemble "in this place for the purpose of hearing the doctrines, "and joining in the worship, prescribed by the founder, "shall no longer enjoy the benefit he intended for you "unless you conform to the alteration which has taken "place in our opinions." In such a case, therefore, I apprehend—considering it as settled by the authority of that I have already referred to—that, where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the Court—and that,

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to refer to any other criterion—as to the sense of the existing majority,—would be to make a new institution, which is altogether beyond the reach, and inconsistent with the duties and character, of this Court.

In this view of the case, it is of the first importance to see what the record before the Court says upon the subject of the original institution. Without entering into what may be the effect of the late statute repealing several then existing laws on the subject—(a question which it is not for me, sitting in a court of equity, to determine, and which would certainly be much better decided by the judges of the courts of Common Law—) without even so much as looking to the point, whether it be, or be not, legal, at this day, to impugn the doctrine of the Trinity, (although that is a point upon which indeed I have an opinion,—only I do not find myself called upon now to declare it—) what I have now to enquire is, whether the deed creating the trust does, or does not, upon the face of it,—(regard being had to that which the Toleration Act at the time of its execution permitted, or forbade, with respect to doctrine—) bear a decided manifestation that the doctrines intended by that deed to be inculcated in this chapel were Trinitarian? Because, if that were originally the case, and if any number of the trustees are now seeking to fasten on this institution the promulgation of doctrines contrary to those which, it is thus manifest, were intended by the founders, I apprehend that they are seeking to do that which they have no power to do, and which neither they, nor all the other members of the congregation, can call upon a single remaining trustee to effectuate. In this view of the case, also, supposing even that, at the time of the establishment of this institution, it had been legal to impugn the doctrine of the

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Trinity, yet if the institution had been established for Trinitarian purposes, it could not now be converted to uses which are Antitrinitarian. For (meaning, however, to speak with all due reverence on such a subject) to allow such a conversion, would be to allow a trust for the benefit of *A.* to be diverted to the benefit of *B.* And the question then resolves itself into this—whether such a conversion, in the case of a trust, can possibly be supported. If, therefore, this appears, on the face of the deeds, to be the nature of the present case—as I am inclined to believe it does—it disposes of the question; affording a short and direct reason for not refusing the interference of the Court.

I am fully aware of the importance, with a view to conciliation, and abating the heat with which I am sorry to see controversies of this sort generally carried on, that a final determination should speedily be made; but at the same time, if deeds have been framed with so little in them that leads to a right understanding of the objects they had in view, it is impossible that the Court should decide without a previous enquiry, which, according to the necessary course of business, must greatly postpone the decision. And this, though it may be lamented, is not the fault of the Court, but the fault of the parties by whom the trusts were originally constituted.

The principle of public policy does not extend to the case of Dissenters, so as to prevent the Court from sanctioning the appointment of

With respect to the choice of the minister—regard being had to the circumstance that this is the case of a Protestant Dissenting minister—I am not sufficiently acquainted with the principles upon which these congregations usually act, to say much upon that subject, without more information than has yet been communicated to me. It may be according to general usage, among certain classes of persons dissenting from

from the establishment, to appoint their ministers for limited periods, or to make them removable at pleasure; and, although a Court of Equity may not be disposed to struggle hard in support of such a plan, yet, were the Court to find such a plan established, I know of no principle upon which the Court would not be bound, if called upon for the purpose, to carry it into effect. The policy of the Established Church has been, by giving the minister an estate for life in his office, to render him (in a certain degree) independent of his congregation. But I do not see how this policy can be extended so as to govern the decision of the Court in a case of this nature, where the trust which the Court is called upon to establish is otherwise constituted.

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a minister to a congregation for a limited period, and not for life, provided such be the usage of the members, or the provisions of the original trust.

So again, with respect to those in whom resides the right of election, I apprehend that here also the Court must not be governed altogether by what it finds on inquiry to have been the established usage. On this subject various statements have been made in the present case, but the deeds are silent. At the same time, however, that I am fully aware of the difficulties the Court has to encounter in executing a trust of this kind, I also know that it is the duty of the Court to struggle with them; and I shall endeavour to execute the trust as well as I can. But, while so many points are unascertained, it is impossible to come to any right decision—it is impossible for the Court to execute any trust until it knows who are the persons in whom it is vested, and what are its objects.

Of one thing at least I am certain—that there must be no proceeding to trial of the ejectment; which cannot, under these circumstances, be attended with any other than a most fruitless and unnecessary expense to the parties; and because, if I can find out the true state of

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the case, with reference to the subject-matter of these inquiries, I shall thereby be enabled to make such an order as will embrace all points in dispute between them.

July 17.

LORD CHANCELLOR.

The motion before me was made in a cause in which the *Attorney-General*, at the relation of *Benjamin Mander* (the surviving trustee under certain instruments which I shall have occasion to mention), and the *Reverend John Steward* (who alleges himself to be minister of the congregation of Protestant Dissenters assembled at *Wolverhampton)*, are plaintiffs, and the defendants are *Joseph Pearson* and four others, representing themselves to be (together with *Mander)* the trustees of the property in question; (which property has been given, as it is expressed in some of these deeds, to the charitable purpose of maintaining this meeting-house); and further contending that *Mander* ought not to be considered, under the circumstances of this case, (created by his own conduct), as being a trustee, or, if he be considered as having vested in him the legal estate in a certain portion of the premises, still that he ought to be held incapable of acting by reason of these circumstances. And this information, (as I understand it,) is filed for the purpose of preventing those who, it alleges, are not to be considered as trustees, from acting in the discharge of what does not belong to them; or, on the other hand, if they be invested with the character of trustees, by reason of having the legal estate in them, then the information is to be considered as insisting that, being invested with the character of trustees for one purpose, they are proceeding to act in that character for a purpose wholly different, and upon this ground contending, that the plaintiffs are entitled

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to certain relief prayed—particularly to that which is the subject of the present application.

[His Lordship here described the several instruments, and other charitable donations mentioned in the statement of this case, together with the existing state of the trust-funds and premises.]

It becomes here necessary (not for the purpose of expressing an opinion on some of the doctrinal points argued at the bar, but in order to see what may be collected by way of fair inference, as to the meaning of the original founders), after observing that the first trust-deed is dated in 1701, to state that, in the year 1689 (1 *Will.* and *Mary*) was passed the act commonly called the Toleration Act (*a*), which exempted certain persons, coming under the description of Protestant Dissenters, from the penalties of certain laws therein mentioned; and, as I again observe, the object seems to have been merely as stated in the title of the act, *viz.* "to exempt His Majesty's Protestant subjects dissenting from the Church "of *England* from the penalties" of the laws therein mentioned; not appearing, therefore, either upon the terms or substance of it, to have done, or to have intended to do, any more—leaving the Common Law exactly as it was with respect to all Common-law offences against religion or religious establishments. And in that act there is an express provision, s. 17. "that no "clause or article therein should extend to give any ease, "benefit, or advantage to any Papist, or Popish recu-"sant whatever, or any person who should deny the "doctrine of the Blessed Trinity declared in the Ar-"ticles of Religion." Afterwards, in the 9th and 10th of *William*, an act passed (*c*), entitled, "An Act for the

The object of the Toleration Act was only to repeal certain penal laws therein mentioned, leaving the Common Law as it stood with respect to all Common-law offences against religion (*b*).

(*a*) 1 *W.* and *M.* c. 18.

(*b*) See before, note, page 375.

(*c*) 9 & 10 *W.* 3. c. 32.

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"more effectual suppressing of Blasphemy and Profaneness," and it recites that, whereas many persons had of late years openly avowed and published many blasphemous and impious opinions, contrary to the doctrines and principles of the Christian religion, greatly tending to the dishonour of Almighty God, and may prove destructive to the peace and welfare of this kingdom; therefore, "for the more effectual suppressing of "the said detestable crimes," it was enacted that "If "any person or persons, having been educated in, or "at any time having made profession of, the Christian "religion, within the realm, shall, by writing, printing, "teaching, or advised speaking, deny any one of the "Persons in the Holy Trinity to be God, or shall assert or maintain that there are more Gods than one, "or shall deny the Christian religion to be true, or the "Holy Scriptures of the Old and New Testament to be "of Divine authority; and shall, upon indictment or "information, be thereof lawfully convicted, upon the "oath of two witnesses, such person shall," for every such offence, and for the repetition thereof, incur such several and distinct disabilities and penalties as by the said act are provided.

The stat. 9 & 10 *W.* 3. c. 32., declares "the denial of any one of the Persons of the Holy Trinity to be God" to be an offence against the Christian religion.

Now, it is to be observed that the opinions, the publication of which in any of the modes specified it is the intention of this act to prevent, are not thereby expressed to be opinions contrary to those of the Church of *England*, but contrary to the Christian religion. And the act proceeds to point out more precisely what is the nature of those opinions which it thus declares to be contrary to the Christian religion, *viz.* the denial of any one of the Persons in the Holy Trinity to be God, &c. It is further to be observed, that the information which was to lead to conviction, where the consequences were so extremely penal, is by the statute required, (in the

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Blasphemy was an offence punishable at Common Law before the stat. 9 & 10 *W.* 3. c. 32. and that statute does not take away the common-law punishment for blasphemy.

the case, at least, of words spoken,) to be within three months of the time of the words being spoken, and that an opportunity is also given to the offender publicly to renounce his error in the same Court where he had been convicted, and thereupon to be discharged from all penalties incurred by such conviction. There can be no doubt, (at least so I apprehend,) that, prior to this statute, blasphemy was an offence punishable at Common Law; and it is impossible to contend, (as it appears to me,) that (whether the preamble is, or is not, to be taken as a ground of ascertaining that the doctrine reprobated in the enacting parts amounts to blasphemy—on which it does not become me to give an opinion) the penalties inflicted by the statute give any foundation for supposing that there could no longer exist a punishment for blasphemy at Common Law, independent of the statute. On the contrary, the Common Law is left by the statute exactly as it was before the statute passed. (*a*)

The late act (*b*), which repealed this statute of *William*, also repeals certain acts against blasphemy in *Scotland*, which are therein particularised. [Here his Lordship read the Scottish statutes above referred to. See ante, note, p. 397.] These statutes remained in force till the 53d year of his present Majesty, and then the act passed, which repealed the excepting clause of the Toleration Act, which repealed the statute of the 9th and 10th of *William*, (so far as relates to the denying the doctrine of the Trinity,) and which repealed the Scottish statutes; and I should observe that there did not (upon the occasion of passing the act in question) seem to be any difference of opinion among the members of either house of parliament, but that they all agreed,

(*a*) See before, note, p. 379. (*b*) 53 *Geo.* 3. c. 160.

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(without entering into the consideration of the question, as to whether it were or were not an offence against the Common Law, or whether the common-law punishment, if any existed, had been taken away by the statutes which it was intended to repeal,) that the penalties, upon that which was considered as blasphemy by the 9th and 10th of *William* and by the Scottish statute, enacted by those statutes, were penalties which it was very difficult to say were proper to be inflicted. The act of the 53d of the King therefore did what I have stated; but I apprehend that it left the Common Law exactly where it was; and, conceiving the object of this information to be as I have already represented it to be; and, remembering that, (whatever may have been stated at the bar, with respect to the question of what is, or what is not, criminal in the conduct of the parties,) I (sitting here) can only administer the civil rights of the parties, this Court having no office to determine what is or is not an offence or crime, except where the question arises, as of necessity, by its being called upon to administer trusts, or regulate civil rights, which are involved in its decision; I will therefore confine myself entirely to the consideration of the civil question, namely, what, in respect to doctrine, was the intent of the founder of this charity.

The act 53 *Geo.* 3. c. 160. extends only to the repeal of the clause in the Toleration Act, and the other statutes therein referred to, but leaves the Common Law where it was.

It must be recollected that, by the Toleration Act, the benefit of that act was declared not to extend to persons impugning the doctrine of the Trinity. That act passed in 1689: and in 1701 (shortly after the opinions in question had been thus expressly declared by the Legislature not to be proper subjects for the toleration which the Legislature had been granting to every other class of Dissenters) the first of those deeds upon which the questions in the present cause arise, was executed.

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[His Lordship then read the deed of the 30th of *October*, 1701, from the answer, observing the allegation in the answer that the feoffment was followed by livery of seisin, a circumstance which, His Lordship said, he did not see alleged, or that it could be made out, as to some of the subsequent feoffments; and upon the purpose for which the meeting-house was declared to be erected — *viz.* "for the worship and service of God," — His Lordship remarked that the terms were very general.]

If land or money be properly given for maintaining "the worship of God," *without more*, the Court will execute the trust in favour of the Established Religion. But, if it be *clearly expressed*, that the purpose is that of maintaining Dissenting doctrines, so long as they are not contrary to law, the Court will execute the trust according to the express intention. And where, as in this case, the intention *clearly appears aliunde*,

Several passages of this indenture have been particuarly taken notice of in the course of the discussion at the bar. There is quite sufficient of allegation in the information to shew that it was a body of Protestant Dissenters who established this meeting-house, in order to have preached in it the religious doctrines to which they were attached; and more especially, if it cannot be said for the express purpose of inculcating the doctrines of the Trinity, yet that they were Dissenters entertaining such a class of opinions, as that the doctrine of Unitarianism would be directly at variance with their purpose in founding this meeting-house. I observe upon this particularly; because I take it that, if land or money were given (in such a way as would be legal notwithstanding the statutes concerning dispositions to charitable uses) for the purpose of building a church or a house or otherwise for the maintaining and propagating the worship of God, and if there were nothing more precise in the case, this Court would execute such a trust, by making it a provision for maintaining and propagating the Established Religion of the country. It is also clearly settled that, if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant Dissenters — promoting no doctrines contrary to law,

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though not *expressed* in the instrument creating the trust, the Court will also carry the manifest design of the founder into execution, so far as it is consistent with law.

It is incumbent on persons meaning to create a trust for charitable purposes, to make their intention clear by the deed creating the trust; and, if it is not so, the Court has no other means of carrying it into execution than by collecting the intention from inference and fair presumption.

law, although such as may be at variance with the doctrines of the Established Religion,—it is then the duty of this Court to carry such a trust as that into execution, and to administer it according to the intent of the founders. In this case, it is impossible to doubt that the trust was originally created for the purpose of maintaining a Protestant Dissenting institution; and it would be doing violence to the intention of the parties to these deeds to say, that, the worship and service of God being the object expressed by them, the trust must be administered in such a way as to maintain the religion of the Established Church. Nevertheless, I take it from the experience of many years in this Court, that, if any body of persons mean to create a trust of land, or money, in such a manner as to render the gift effectual, and to call upon this Court to administer it according to the intent of the foundation, whether that trust has religion for its object or not, it is incumbent on them, in the instrument by which they endeavour to create that trust, to let the Court know enough of the nature of the trust to enable the Court to execute it; and therefore, where a body of Protestant Dissenters have established a trust without any precise definition of the object or mode of worship, I know no means the Court has of ascertaining it, except by looking to what has passed, and thereby collecting what may, by fair inference, be presumed to have been the intention of the founders. From this deed, I can collect that the founders were Protestant Dissenters, and thence presume that their object was the maintenance of Protestant Dissenting worship: but I have nothing to inform me what species of doctrine this institution was intended to maintain, except as I may be able to infer from some of the clauses of the deed, and particularly from that clause which alludes to the possibility of the future prohibition by law of the worship thereby intended to be established, and also from that

which

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which relates to the binding effect of orders to be made by a majority of the trustees, upon matters relating to the meeting-house *only;* from which it should appear, both that the founder meant to establish an institution which was not then contrary to law, and that they did not mean to invest in the trustees, or the major part of them, any right to vary the system or plan of doctrinal teaching which was to be maintained in this meeting-house according to their own discretion.

Inference, from the clause in the deed relating to the possible future prohibition of the worship thereby intended to be established, that the worship was such as, at the time of the execution of the deed, was not excepted out of the benefits of the Toleration Act.

When I look to the date of the deed of 1701, and to the dates of the Toleration Act, and of the act of the 9th and 10th of King *William*, and also to the deed executed in 1742, which contains the same clause with the former, it is impossible to say, that, while the founders contemplated the eventual abrogation of the existing system of toleration, they were in fact intending to create by that very deed a system which was at that time illegal, and which, only three years before, was excepted out of the Toleration Act, as a system unfit to be included in the toleration which was extended by it to all other modes of Protestant dissent; the Legislature at that time intending to embrace all the doctrines that could be safely included in that toleration. This clause therefore seems to afford extremely strong countenance to the allegation, that the institution was not intended to be for the maintenance of those opinions which impugn the doctrine of the Trinity. And, with respect to the clause which invests the trustees, or the major part of them, with the power of making orders from time to time upon matters relating to the meeting-house, I think it would be doing violence to all the principles of construction upon which we act, to understand it as meaning that those trustees, or the major part of them, should have power to convert that meeting-house, whenever they thought proper, into a meeting-house

A clause enabling the trustees to make orders, &c. upon matters relating to the meeting-house, not to be construed as enabling them to convert the

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objects of the charity, as by introducing a new form of worship and new doctrines, &c.

Clause, in case of the desertion or removal of trustees, directing the remaining trustees, within a limited time, to elect new trustees in the room of the trustees so deserting, &c. does not extend to disable a trustee, so having deserted, &c. from acting again, where no successor had, in the mean time, been appointed, nor to the case of a trustee who had left the object of his trust, (a congregation of Protestant Dissent-

house of a different description, and for teaching different doctrines from those of the persons who founded it, and by whom it was to be attended. I say, that appears to me to be as inconsistent with the probable meaning of the original founders, as it would be to hold that they meant it should be converted, at the discretion of the trustees, into a place of worship according to the form and doctrines of the Church of *England*.

With regard to the clause which is supposed to affect *Mander*'s character as a trustee, from his having withdrawn himself from the congregation, it is to be observed, first, that he could not be discharged under it without a regular proceeding on the part of the remaining trustees to replace him by a successor; and, next, if the meaning of these parties has been to divert the institution from its original purpose, by causing it to maintain doctrines such as these that are charged by the information, this Court would never permit that he should be discharged from the office of trustee, for endeavouring to preserve the object and ends of the institution, for the protection of which the very clause, now insisted upon as depriving him of his character of trustee, was introduced into the instrument.

Another part of the trust is settled by a deed of the 1st and 2d of *February*, 1720.

[His Lordship here read the deed in question, which is stated above, p. 362.]

Upon the provisions of this deed there arises a question, (upon which usage will have great effect,) Whether, according to the original constitution of this society, the minister, preacher, or pastor could be appointed for three years only, or, whether, according to the general principles

principles of this body of Dissenters, the congregation and minister might agree, that the one will give, and the other accept, a nomination for three years only. It appears highly probable that the person who gave this part of the fund contemplated a provision for the minister for his life, since he has expressly given it to him for life, even when he could no longer officiate as minister; but, on the other hand, it may turn out to be established by usage, that he was only a temporary minister, elected with the concurrence of the congregation, and liable to be removed in the same manner as he was called upon to officiate.

ers,) on account of its having been converted, against his approbation, to purposes distinct from the intent of the founder.

Upon the clause respecting the desertion or removal of any of the trustees, which occurs in this deed also, and contemplates the event that the trustees "should "change, or become of any other religion or persua-"sion whatsoever, contrary to, and different from, the "said congregation," I must observe that, if the question comes before this Court, in the execution of a trust, whether a trustee has been properly removed, and that point depends upon the question, whether the trustee has changed his religion, and become of another, (as in this instance,) different from the religion of the rest of the society, it must then be *ex necessitate* for the Court to enquire, what was the religion and worship of the society from which he is said to have seceded,—not for the purpose of animadverting upon it, but in order to ascertain whether or not the charge is substantiated. It must then (I say) be necessary that this Court should enquire what religion the congregation is of, and also what is the religion of the man who is, or is sought to be, removed from the trusteeship because he is of a diffe ent religious persuasion from that of the congregation.

Upon a clause for the appointment of new trustees, in case of any of the old trustees changing, or becoming of a different religion from the congregation, if any question arises whether a trustee has been properly removed, it becomes necessary for the Court to enquire what was the religion of the society, not to animadvert upon it, but to ascertain whether the charge is substantiated.

Then

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Then follow the words of the clause relating to the appointment of new trustees, in any of the events before contemplated. Now, this trust, being created in *1720*, became, in 1792, vested in *Mander* and eleven others, including a person, who (it is insisted by the defendants) never acted: and the object of the information is to allege, first, that *Mander* is the only trustee, and that the defendants have no right to interfere at all; and next, that, if the defendants can be considered as being invested with the character of trustees, as well as *Mander*, they have no right to act as they are now doing, by reason of their not having observed due forms in their proceedings, and being engaged in introducing a doctrine and mode of worship into the meeting-house directly contrary to that which it was the original founder's intention should be preached and maintained in it. If the defendants have not been duly elected trustees, then *Mander* must be admitted to be certainly the surviving and only trustee, as all the other trustees named in the deed of 1772 are dead, and the defendants admit that the legal estate, in a fifth of a part of the property, and in a sixth of another part, is still vested in *Mander*; but they nevertheless contend that, *Mander* not having done any act in the execution of the trust since *1792* or *1793*, this legal estate must be in him only subject to the trusts being administered by them (the defendants,) according to their own discretion.

Now with respect to the intent of the donors, as it is to be collected from the answer of the defendants, they state it in this way.

[His Lordship here read the admissions and denials of the answer relating to this part of the case: which see *ante*, page 367, 372, &c.]

I agree

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The question of religious belief is irrelevant, except so far as the Court is called upon to execute the trust: but, if the defendants make out that no particular mode of belief was intended, still they must shew that the meeting-house was for such purposes as the law can sanction.

I agree with these defendants, that the religious belief is irrelevant to the matters in dispute, except so far as the King's Court is called upon to execute the trust: but, even if they make out that this was a trust, merely for the establishment of a Dissenting meeting-house, without regard to any particular tenets, still that must be qualified, by shewing that it was a meeting-house that could be legally sanctioned and established; and in that point of view the Court is bound to consider the question as relevant.

They seem, however, to have gone on harmoniously in this meeting-house till the election of Mr. *Jameson* by some part of the congregation, and the invitation of a Mr. *Griffiths* by another part of the congregation, some of the trustees being for one, and some for the other. That dissension ended by Mr. *Griffiths* keeping possession of the meeting-house and the pulpit; and, (if I have not misunderstood what is meant to be stated in this answer), this Mr. *Griffiths* was a gentleman whose opinions leaned more to Unitarianism than to the contrary doctrine. He kept possession of the meeting-house and pulpit till the year 1804.

It appears that, in 1793, a deed of feoffment was made of both estates to twelve persons: but *Mander*, who had a portion of the estate, although made a nominal party to that deed, refused to execute it, and *Headley*, in whom by the prior deeds the estate had been vested, as a co-trustee of part of the property with *Mander*, but who had never acted, also did not execute. The consequence of that would be this;—that, whatever interest was vested as to the legal estate in *Mander* and *Headley*, the interest so vested in them would not pass to those who were attempted to be made new trustees; and in this kind of transaction I apprehend that the Court would

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be bound to interpose; since this Court would never permit the entirety of the estate to be split among different trustees, from a consideration of the inconvenience that must necessarily result from such a division. It does, however, appear, that *Mander* would not execute the deed, and *Headley* did not execute it, for this reason, (as I collect it), *viz*. that they considered the congregation to be one having a different system, and maintaining a different religious belief, and hearing the preaching of a different kind of doctrine, from what it was originally intended should be taught in that meeting-house. To make this feoffment effectual, also, it would be necessary that livery of seisin should have been made; and it is not alleged by the answer that this was ever effected; and, although it appears by the deed, that persons were appointed to deliver seisin, there is a difficulty too about that, which may raise the question, where the legal estate is at the present moment. For the deed states it to be a joint power of attorney to deliver seisin, and, if all the persons thereby appointed to deliver seisin did not do so, the question then is raised, whether authority can be given to deliver seisin as to part of the premises only? I do not say how it would turn out: but it is a matter still to be examined, whether the defendants have any estate at all in the premises.

Livery of seisin not having been made according to the terms of a joint power contained in the feoffment, and one of the parties to whom power is given to deliver seisin refusing to execute it, *quære*, if authority can be given to deliver seisin as to part only.

Towards the end, however, of the year 1813, the major part of those persons elected *Steward* to be the officiating minister; and they say that, in 1816, upon the change of his religious tenets, they called upon him by a notice (alleged to be given with the consent of the congregation) to withdraw; intimating to him, nevertheless, (as I understand the answer), that, having formerly taught the doctrines of Unitarianism, if he will now abjure the contrary doctrines, and continue to preach those of Unitarianism, they will have no objection to retain

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tain him as minister, and that, at all events, they will let him remain there for three months, preaching any doctrine he may think proper.

I repeat that I have nothing to do here in the way of pronouncing any opinion as to any religious doctrine whatever. This case must be discussed exactly as if it were the case of a charity properly created, having no relation whatever to any religious purpose, but a case in which one party contends that the trust was originally for purposes of a particular description, (and has a right so to contend,) against another party who insists that it was originally for other purposes. And the Court is bound to determine this question, if it arises. It would not, perhaps, be difficult to decide where the legal estate is: but, after that has been disposed of, there still remains the other question; (*viz.*) for what purpose that legal estate was vested in the persons in whom it now resides? For the Court will not permit that purpose to be altered, unless it be obvious, from the original nature of the institution, that it was meant to be capable of such alteration.

Now, where a clergyman is presented to a living in the Church of *England*, we know the duties committed to him, and the grounds upon which he is bound to execute those duties: but, as the justice of this country has, for the ease of men's consciences, permitted them to secede from the established Church, and to form religious institutions for themselves, to a certain extent, it has become the duty of this Court, and others of a like nature, to enforce the execution of trusts for such institutions, and to give the parties who are trustees that relief which the Legislature meant they should have. It is necessary, therefore, to look to the instruments, to know what are the trusts which the Court is called upon

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to enforce the execution of; and, if the parties themselves do not give the information which is requisite, it is in vain to look for a prompt decision with reference to the point in controversy; because, till inquiry has been made as to the nature of the trusts, a judge must remain in ignorance of the duty he has to perform. Where, then, a charitable institution of this kind is founded—or, say it were for a civil purpose, that we may the more temperately discuss the subject—I apprehend then, that where a man gives his money to such an institution for a civil purpose, one of the duties of this Court is to take care that those who have the management of it shall apply it to no other purpose so long as it is capable of being applied according to the original intention. And if, upon enquiry, it shall be found that in this case the land was originally given, and the money originally subscribed, for the purpose of forming an institution such as the *Attorney-General* in his information has alleged that this institution should be, then those who object to any change in the institution from its original purposes are not guilty of departing from the institution, but are only doing their duty in endeavouring to prevent such a departure from the purposes of the institution in others; and, if the allegation is, that there has been such an alteration of sentiments on the part of the congregation, they certainly do throw great difficulties in the way of the Courts carrying the trusts into execution in any manner whatever.

Where two parties seeking the benefit of a trust for charitable purposes differ as to the mode of carrying it into effect,

I must here again advert to the principle which was, I think, settled in the case to which I referred the other day as having come before the House of Lords on an appeal from *Scotland*—*viz.* that if any persons seeking the benefit of a trust for charitable purposes should incline to the adoption of a different system from that which was intended by the original donors and founders;

and

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and if others of those who are interested think proper to adhere to the original system, the leaning of the Court must be to support those adhering to the original system, and not to sacrifice the original system to any change of sentiment in the persons seeking alteration, however commendable that proposed alteration may be. Upon these grounds, I have nothing at all to do with the merits of the original system, as it is the right of those who founded this meeting-house, and who gave their money and land for its establishment, to have the trusts continued as was at first intended. It is necessary, therefore, to make inquiries as to what was the nature of that original system; and in the mean time, it is perfectly absurd that any ejectment should be going on.

One party being in support of the original system, the other for some proposed alteration to be made in it, the leaning of the Court must be to the former, however useful it may judge the proposed alteration to be.

For these reasons, I shall now grant an injunction, not till the hearing of the cause, but till the further order of this Court; the parties undertaking to account for the intermediate rents and profits, (except so far as is necessary to maintain the minister,) and to obey such order as the Court shall make. If the parties will submit to give that undertaking, I don't know how to go more promptly to a decision than by allowing the matter of inquiry to go to the Master immediately. I wish there were any shorter mode of deciding it; and, if by *Mandamus*, or by any other proceeding you can propose, such a decision can be accomplished, I shall have no objection.

[The parties having acquiesced in regard to the proposed undertaking, his Lordship then proceeded to direct the inquiries, which were afterwards drawn up according to the form of the following minutes:]

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"The relators and defendants undertaking to obey "such order as this Court may hereafter think fit to "make, with respect to the possession and intermediate "rents of the meeting-house, &c., let the defendants "be restrained by the injunction of this Court from "further proceeding at law in the ejectment, &c. "and from all other proceedings at law to recover "possession, &c. until the further order of this Court; "and refer it to the Master to enquire, in whom the "legal estate of and in all the trust premises, &c. is "vested; and who have a right to call in the money "due on the promissory note for 260*l.* And let the "Master enquire what was the nature and particular "object (with respect to worship and doctrine) for the "observance, teaching, and support of which, each and "every of the said charitable funds or estates respec-"tively were or was created or raised, distinguishing "when and by whom the same were or was respectively "created; and let the said Master enquire and state, &c. "the usage of Protestant Dissenters as to the election "of their ministers, and the duration of their office as "such, and particularly whether any agreement or "understanding was entered into between the relator, "*John Steward*, and the defendants, *Joseph Pearson*, "*Joseph Stanley*, *Joseph Baker*, and *Thomas Wil-*"*liams*, or any of them, and the persons for the time "being members of the congregation attending the said "meeting-house, and subscribing to its support, touch-"ing the duration of the ministry of the said *John* "*Steward* in the said meeting-house, &c."

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WITHER v. The DEAN and CHAPTER of WINCHESTER, and LAMPARD.

Lease from Dean and Chapter, with covenant not to make sale of or take any timber-trees growing or to grow on a certain part of the premises save for the necessary building, or repairing, &c. of their cathedral church, or of the church buildings thereto belonging.

Bill by lessee to restrain the Dean and Chapter from selling or cutting except for the purposes aforesaid.

Injunction obtained on filing the bill dissolved on the coming in of the answer, stating that the whole of the timber was wanted for the purpose of repairs; the covenant not extending to deprive them of the right which they might have exercised independent of it; and deans and chapters, like other ecclesiastical persons, not being liable to be restrained in case of waste, either by prohibition or injunction, except in the Ecclesiastical Court, or at the suit of the Crown.

It seems that the right to cut timber for the purpose of repairs extends to selling timber and applying the produce.

THE bill stated, that by indenture (25th *Nov.* 1814) the defendants, the Dean and Chapter of *Winchester*, demised to the plaintiff, for twenty-one years, the mansion-house, &c. of *Manydown*, county of *Southampton*, "and all demesne lands and premises then or at "any time occupied therewith, and all profits and ad-"vantages thereof, in as beneficial a manner as at any "time theretofore the same had been used or occupied," together with certain other premises; with a reservation to the lessors, and their successors, (among other things,) "of all timber-trees then growing or to grow "thereon, with free ingress, egress, and regress, to "cut and carry away the same." The indenture contained a covenant on the part of the plaintiff, not to cut any of the coppices except at seasonable times, nor to grub up, except certain parts of the said coppices therein mentioned. There was also a covenant on the part of the defendants that the plaintiff, his executors, &c. should and lawfully might, yearly during the term, cut and take sufficient house-bote for the maintenance, continuance, and new building of the houses then being on the premises, with sufficient fire-wood, hay-bote, plough-bote, cart-bote, and fold-bote, to be employed on the premises, without sale of timber, waste or de-

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struction. Also that the defendants should not, during the term, make any sale or grant of, or take, any timber-trees growing or to grow on certain parts of the demised premises therein specified (called "The *Upper* "*Park*, *Lower Park*, and *Morwell Rows*,) save for the "necessary building, repairing, upholding and amend-"ing of the cathedral church of *Winchester*, or the "church-buildings thereto belonging, and in such case "leaving upon the premises from time to time sufficient "timber for the repair of the buildings thereon, for "fences, &c. and for the timber-botes aforesaid."

The bill further stated that, at the time of the execution of this indenture, the plaintiff was in possession of the demised premises; that there were then large quantities of timber and other trees on that part of the premises called *The Upper* and *Lower Park* and *Morwell Rows*, within a near view of the house in which the plaintiff resided, and very ornamental thereto; that none of those trees were then wanted for the purposes specified in the exception above noticed, but that, nevertheless, the defendants (the Dean and Chapter) in the month of *January* last, gave orders to their woodward to enter and cut down divers of the trees so growing in the *Lower Park*, in consequence of which the plaintiff applied by letter to the other defendant, (who was the solicitor and agent to the Dean and Chapter,) stating the injury which (as he apprehended) would be sustained by him in the execution of those orders, and the expenses he had been at in improvements on the premises, which would thus be rendered ineffectual, referring to the clause of the indenture, as introduced for his special protection against such injury; and threatening to proceed for an injunction in case the defendants should not desist; to which he received for answer, that the woodward having reported to the Dean and Chapter certain trees in the

Lower

Lower Park as proper to be cut, they had given directions accordingly, but were ready to sell them standing to the plaintiff, if he wished to preserve them, upon a fair valuation.

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The bill charged that this offer on the part of the defendants, by their agent, was evidence that the trees in question were not wanted for the purposes of repairs, &c. It stated that the plaintiff, conceiving they had no right to cut except for such purposes as aforesaid, declined the offer, and informed them of his intention to institute the present proceedings. And it accordingly prayed "an injunction to restrain the defendants (the "Dean and Chapter), their woodwards, servants, agents "and workmen, during the continuance of the term "aforesaid, from making any sale or grant, or taking "or cutting any of the timber or other trees then grow-"ing or to grow on the premises therein specified "except for the purposes aforesaid."

The injunction was moved for and obtained upon affidavit.

The defendants (the Dean and Chapter) afterwards put in their answer, whereby they stated, that, at the time of the execution of the indenture in the bill mentioned, the plaintiff was in possession under a lease from the Dean and Chapter to his (the plaintiff's father), which lease contained the same covenants, with respect to the timber and coppice wood, as were contained in the indenture in question; and that other leases of the same premises with the like covenants had, from time to time, for a great many years past, been granted by the Dean and Chapter to the plaintiff's ancestors. The answer then referred to various breaches of covenant said to have been committed by and on the part of the plaintiff;

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plaintiff; and it further stated that timber was at that time wanted for repairs of the cathedral, and of other church buildings, to so considerable an amount that the whole of the timber then growing on the premises would be insufficient for the purpose of supplying them. It further stated that alterations had been made in the premises by the plaintiff, since the date of the indenture, by throwing an adjoining coppice into, so as to make it form a part of, the premises described in the indenture by the name of the *Lower Park*; and the defendants therefore, disclaiming any intention of cutting timber on that part of the premises to which the covenant extended, insisted upon their right to cut, for the purpose of repairs, upon the premises so lately taken into the *Lower Park*, as not being included in the covenant. They represented that they (the defendants) were in the habit of selling the timber on other estates belonging to them in distant parts of the country, and applying the produce to the purpose of repairs; and insisted that they were not, by the covenants in the indenture, restrained from so disposing of the timber in question. That the improvements stated in the bill to have been made by the plaintiff were made without the consent of the defendants, and also, in some respects, in breach of his covenants.

A motion was now made, on behalf of the defendants, (the Dean and Chapter) to dissolve the injunction.

Leach, *Bell* and *Dowdeswell*, in support of the motion, insisted on the right of the defendants to cut for the purposes of repairs, according to the representation made by their answer, and that such right extended to ornamental timber, although, out of complaisance to their tenants, they had not usually exercised it with regard to ornamental timber. But the offer contained in *Lampard's*

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pard's letter to the plaintiff, *viz.* to sell the trees standing at a valuation, was a mere matter of courtesy, and did not amount to any evidence that the trees were not in fact wanted for repairs, since the money which would be paid for them might have been so applied. That it would be attended with great inconvenience and loss to the defendants if it should be held that they were bound to apply the identical timber, and not the produce—the premises in question being at the distance of eighteen miles from the cathedral, and the principle of course extending to all the estates belonging to the defendants, situated at whatever distance, and they referred to a case, lately decided at the Rolls, of *Exeter College* (*a*), and what is said by Lord *Hardwicke* in *Knight* v. *Mosely*. (*b*)

Sir *Samuel Romilly* and *Shadwell*, contrà, in support of the injunction.

Two questions have been made—first, whether the timber protected by this injunction does in fact lie within the premises excepted by the covenant in the indenture, and secondly, whether, supposing it not to be so included, these defendants have a right to cut except for the purpose of applying the identical timber towards the repairs of the cathedral and buildings. As to the first question, the affidavit filed in support of this injunction is positive and conclusive, and the answer very vague and unsatisfactory. Besides, in all cases of doubtful covenant, the Court will adopt that construction which is most favourable to the covenantee. On the second point; in *Knight* v. *Mosely* the question did not arise; and the case referred to, of *Exeter College*, is no authority for the present, depending, as it did, on its own peculiar

(*a*) *The Attorney-General* v. *Geary*, Rolls, June 20. See post.

(*b*) Ambl. 176.

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peculiar circumstances, so that the general question remains unaffected by its decision. This question, also, it must be observed, is wholly independent of what may or may not be the true construction of the covenant; as it affects the general rights of ecclesiastical corporations with respect to the cutting of timber on their estates, as to which it may be generally stated that ecclesiastical persons have no such right except for the purpose of necessary repairs; and that the statute (*a*) which restrains alienation by such persons on the ground of dilapidation, although it refers in express words only to the ruin and decay of buildings, is by a parity of reason to be extended to timber or any thing else which constitutes part of the inheritance. (*b*).

Leach in reply.

A lessee cannot assert any right in derogation of his lessor's title. In this case, admitting that the Dean and Chapter were bound specifically to apply the timber cut to the purposes of repairs, that would not give their tenant a right to restrain them from cutting, unless they are so restrained by the express terms of their covenant. And see *Jefferson* v. The Bishop of *Durham* (*c*), and *Knight* v. *Mosely* (*d*). But the exception in the covenant is for the purposes of repairs generally, and the injunction at all events is too extensive in terms, comprehending equally the act of cutting, and of selling when cut.

The LORD CHANCELLOR.

If the Dean and Chapter want the whole of the tim-

(*a*) 13 *Eliz.* c. 10.

(*b*) See 2 Burn's Eccl. Law, 152. and the authorities there referred to.

(*c*) 1 Bos. and Pull. 105.

(*d*) Ambl. 176. *Bradly* v. *Stracy* (or *Strachy* v. *Francis*), 3 Barnard 399. 2 Atk. 217. *Hoskins* v. *Featherstone*, 2 Bro. C. C. 552.

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ber on the premises in question, for the purposes of repairs, there can be no doubt, independently of the covenant, that they would be justified in insisting that the whole shall be so applied. Unless the interests of Deans and Chapters are capable of being distinguished from those of other ecclesiastical bodies in some respect which I am unable to discern, they have this limited right to the timber without any special provision. I concur in the remark of Lord C. J. *Eyre* in *Jefferson* v. The Bishop of *Durham* (a), on the good effect which is likely to result from the discussion of such questions. And it was by that case settled, that as only the patron can prevent a rector or vicar, so a bishop cannot be prevented otherwise than by prohibition, or by injunction at the suit of the Crown, by its Attorney-General, from exercising the right in question. (b) The case of *Mosely* v. *Knight* (c) decides that the patron has the same right against a rector, which the Crown, or the Metropolitan, may exercise in the case of a bishop. There, too, Lord *Hardwicke* expressly declares, (if his words are rightly reported,) that parsons may not only fell timber or dig stone to repair, but that they have been indulged in selling such timber or stone, where the money has been applied in repairs. Whether it might be pro-

(a) 1 Bos. and Pull. 120. 129.

(b) "The Crown has its officers, whose duty it is to watch over its interests. The Metropolitan may proceed against the bishop for dilapidation. The officers of the Crown and the Metropolitan, may exercise their discretion, &c. However, I do not found my opinion on the exercise of a discretionary power residing in the Court, but that neither on principle nor on precedent are we warranted in granting this prohibition at the instance of a stranger." *Heath* J. in *Jefferson* v. Bp. of *Durham*, 1 B. and P. 131.

(c) Ambl. 176.

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per, in this case, for the Court to interfere by injunction, if an application were made by a party having a right to apply to the Court for such purpose, it is not for me now to determine; and I shall only observe this singularity in the case, that, supposing the representation made by the defendants to be correct, that the whole of the timber is necessary to be cut down for the purpose of repairs, there would be no timber left for the like purposes hereafter.

Now it is impossible to say that a tenant holding under a particular agreement is not, with respect to the right of the ecclesiastical person (his landlord), to cut for the purpose of repairs, an uninterested stranger except so far as he may have derived any right or interest under or by virtue of his agreement. He can therefore have no title to interpose by any restrictions on the right of his landlord except what his agreement gives him. In the present case, the covenant must be construed with reference to the actual situation of the parties at the time it was entered into. It has indeed been made a point of some controversy whether an ecclesiastical person is bound specifically to apply the timber he has cut for the purpose of repairs towards the actual repairs for which it was wanted. If the case referred to be correctly reported, it was Lord *Hardwicke*'s clear opinion that ecclesiastical persons are not so restricted; and I shall only add that, if it were otherwise, the obligation imposed upon them would tend greatly to defeat the general intention of law, that the possessions of the church shall constitute a fund for the maintenance of the church, if ecclesiastical bodies are compelled in every instance to apply the identical timber by removing it from the most distant parts of the country in which it may happen that their property lies. The true meaning of the covenant could not be to alter the situation of

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the parties as to the right intended to be reserved by it; and there is nothing in the terms to justify such a construction. In every former lease, as well as the present, the defendants have expressly reserved to themselves the same right of cutting.

I am therefore of opinion that the plaintiff in this case has no equity which this Court has a right to administer, or which authorises me to maintain the injunction. I shall only add, as matter of general observation, which may be applicable in the present instance, that, if there should ever happen, by cutting timber for repairs, not to be enough left for the purposes of repairs in future, that would necessarily be a matter of very bad and serious consequence.

[Injunction dissolved.]

Reg Lib. B. 1816. fo. 1360.

LEWIS v. LOXHAM.

April 28.

Bill by purchaser for specific performance, ordered to be dismissed for defect of title, a necessary party not choosing to concur in conveying. Order to dismiss, *without costs*, it being against the principles of the Court to order the defendant to pay the plaintiff his costs.

ON a bill by purchaser for specific performance, it was referred to the Master to enquire whether a good title could be made. The Master reported that a good title might be made with the concurrence of certain persons mentioned in his report—among others, of one *Susanna Gordon*. (*a*) An order was afterwards made, on petition, that it should be referred back to the

(*a*) See ante, Vol. I. . 179.

Master

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Master to review his report, so far as he had therein certified the necessity of *Susanna Gordon*'s concurrence, and to state the grounds on which he judged such concurrence necessary. The Master made his second report, setting forth the facts upon which he had proceeded in forming his judgment. To this report exceptions were taken; and the cause now coming on upon the exceptions, and for further directions, it was agreed that the exceptions must be over-ruled, and the bill dismissed: but it was nevertheless contended, on the part of the plaintiff, that the defendant ought to pay the plaintiff his costs.

Sir *S. Romilly* for the plaintiff.

Benyon, for the defendant, objected to this as contrary to the principles of the Court; and said, the constant course was to dismiss the bill without costs upon such an occasion.

Sir *S. Romilly* desired it might stand over to search for precedents: but he did not afterwards produce any, and the order was made accordingly to dismiss the bill without costs. (*a*)

(*a*) This I had *ex relatione*. Upon reference to Reg. Lib. 1816. B. fo. 1059. however, it appears that the defendant was ordered to pay to the plaintiff his costs of the second reference, and of the report made thereon, but not of the former proceedings.

In *Springfield* v. *Ollett*, before the *Vice-Chancellor*, 19th *June*, 1817, I am informed that his Honor doubted, and seemed to think that a bill might be dismissed, and the defendant at the same time made to pay the costs. But the point was not decided.

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Rolls.
July 17.

GEARY and Others, *v.* BEAUMONT and Others.

Specific legacy to an executor, who afterwards becomes bankrupt and commits a devastavit. The subject of the specific bequest being sold by his assignees, Held, the produce in their hands not specifically liable to make good the devastavit, in favour of the parties beneficially entitled under the will, but that such parties are only entitled to prove to the amount of the devastavit.

JAMES TAYLOR by his will gave (among other things) to the defendant *Beaumont*, his executors, &c. his leasehold house in *Norfolk Place*, for the residue of his term therein, and appointed him his executor.

The usual decree for an account was made at the hearing; but, before the Master made his report, the defendant became bankrupt, whereupon a supplemental bill was filed against his assignees; and by a decree made on the hearing of the supplemental cause it was ordered that the former decree should be prosecuted, and the plaintiffs (the residuary legatees) to be at liberty to go in under the commission; and the Master was thereby directed to take an account of money received by the defendants (the assignees) in respect of the purchase-money of the leasehold estate sold by them (the assignees), and to enquire whether the same was properly sold, and under what circumstances.

In pursuance of these decrees, the Master made his report, certifying a balance due from the defendant *Beaumont*'s estate to the estate of the testator; and, with regard to the inquiries directed as to the leasehold estate sold by the defendants (the assignees), the Master found that the defendant *Beaumont* was, previous to his bankruptcy, a collector of taxes, and, having made default, an extent had issued, under which certain parts of his property had been taken, but the extent was not yet satisfied; and the defendants (the assignees), being aware of the deficiency, and apprehending that the leasehold house in *Norfolk Place* (which was the same that

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that was given by the testator's will to the defendant Beaumont) would also be taken and levied under the extent, did, for the purpose of preventing the loss and expense which would thereby accrue to the estate of their bankrupt, engage to make good the deficiency, which had been since done partly by the sale of the house in question; and under these circumstances the Master was of opinion that the house in question (being the same with reference to which the inquiries had been directed) was properly sold by the assignees under the assignment, for the sum of 340*l.*, which sum he found that they (the assignees) had received for the purchase-money thereof.

The cause now coming on for further directions, the only question was, whether, the leasehold estate in question being a specific bequest to the defendant (the bankrupt executor) under the will of his testator, the produce of that estate, when sold by his assignees, was liable to be specifically applied to make good the *devastavit* committed by him; or whether the assignees were entitled to the produce as part of the general estate of the bankrupt, leaving the parties claiming in respect of the residue to their proof under the commission.

Hart, *Cooke*, and *Dowdeswell*, for the residuary legatees.

Bell and *Perkins* for the assignees.

The case of *Jeffs* v. *Wood* (*a*) was cited in argument, not as a case in point, but as containing principles which were generally applicable to the subject.

(*a*) 2 P. Wms. 128.

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The MASTER *of the* ROLLS, when the cause first came on, desired that the point (which, it seems, unexpectedly arose) might be a little more looked into. He said that, undoubtedly, at first sight it appeared a strong proposition, that an executor, being a debtor to the estate, could take any part of it. It should seem that an executor, by assenting to his own legacy, cannot alter the case as affecting himself; and it was not pretended that the assignees can stand in a different situation.

On a subsequent day the cause was again mentioned, when I was not present: but I am informed that the counsel who argued it not producing any authorities, *His Honour* said, he was of opinion that this specific bequest could not be applied to satisfy the *devastavit*, for that, when no debts are due from the testator, the Court has nothing to do with the specific legacies, and must confine its administration to the effects not specifically bequeathed. That this was not the case of an executor applying to the Court for its assistance in the administration, but that of a hostile application against the executor. And he therefore held that the assignees were entitled to the produce of the leasehold estate in question.

"Declare, That the 340*l*. received by defendants "(assignees) on account of the sale of the leasehold "house, No. 5, *Norfolk Place*, ought not to be "applied in making good assets of the testator pos- "sessed by defendant (bankrupt.)

"Order, defendants (assignees) to pay into the Bank "(with the privity of the Accountant-General, &c.),

 "any

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"any dividends which shall from time to time become "payable in respect of the debt to be proved by plain-"tiffs under the commission; the amount thereof to "be verified by affidavit."

Reg. Lib. 1816, A. fo. 2007.

Rolls. *July* 17.

MARY ESSINGTON, Widow, - PLAINTIFF;

AND

VASHON and Others, - - DEFENDANTS.

Under a bequest of "all debts due and owing to the testator at the time of his death," a bond conditioned for replacing a sum of stock sold by the testator after the date of his will, and lent by him to the obligor, was held to pass; the day stipulated for the re-investment being passed at the time of his death; therefore not comprehended in the residuary devise enumerating (among other things) "his government stocks and funds."

SIR *WILLIAM ESSINGTON*, by will dated *June* 26, 1813, gave his household goods, &c., "and "all his ready money, and debts due and owing to him "at the time of his death," with other things, to the plaintiff (his wife) absolutely; and, after giving some pecuniary legacies, he devised and bequeathed all his messuages, lands, &c., "and all his government stocks "and funds," with other things, and all other his real and personal estate whatsoever not thereinbefore given, (subject to payment of his debts and funeral expenses,) unto and to the use of the defendants, *Vashon* and *Smith*, their heirs, &c., upon trust to permit the plaintiff to receive the rents, interest, &c. during her life, and after her decease, and after payment of certain other legacies given upon that event, he directed that his said trustees should stand possessed of 600*l.* upon trust for such persons, &c. as the plaintiff should by deed or will appoint, and in default of appointment to fall into the residue; and, subject thereto, to stand possessed of such residue upon the trusts therein mentioned.

After making his will, the testator lent to Earl *M.* the sum of 1000*l.* upon the security of a mortgage and bond, dated the 20th of *December*, 1813. And in

January,

January, 1816, he lent the said Earl the further sum of 3096*l.* 6*s.*, by selling out 3500*l.* navy 5 *per cents.*, which belonged to him at the time of making his will, taking as a security for this further loan the Earl's bond conditioned for replacing the stock so sold out on or before the 10th of *July* following, and making good to the testator, or his executors, &c., the dividends which would otherwise have accrued due in the interim.

The testator died on the 12th of *July*, 1816; and the bill, filed by his widow, prayed a declaration that the plaintiff was entitled to the absolute benefit of the said bonds and mortgage, and that all necessary directions might be given for collecting the debts which were due to the testator at the time of his death--the bonds to be delivered up, or otherwise secured for the plaintiff's benefit.

The question was, whether the plaintiff was or was not entitled to the benefit of these securities, and the sums secured thereby, under the bequest to her of "all "debts due and owing to the testator at the time of "his death;" and it was contended, on the part of the defendants, particularly as to the latter sum of 3096*l.* 6*s.*, that the condition of the bond being merely a contract to replace a specific sum of stock, from its nature of fluctuating value, the same could not be at all considered as comprehended under the term "Debts," but should rather be taken as government stock, which it was intended to be, the day on which it was to have been replaced being already passed before the death of the testator.

The MASTER *of the* ROLLS said, that the question depended upon what was the actual description of the property at the time of the testator's death, the bequest

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ESSINGTON v. VASHON.

of debts being prospective. That, the day being then passed on which the stock was to be transferred according to the condition of the bond, this was, at that time, no other than a debt due to the testator; and the circumstance, that the debtor might still transfer the stock, could not alter or affect the rights of the parties.

"Declare, plaintiff entitled to the benefit of the "bond and mortgage for securing 1000*l*., and of the "bond for securing the said stock, and the interest, "dividends, and produce thereof. Defendants (trus-"tees) to proceed to get in what was due thereon, and "to pay the same to the plaintiff."

Reg. Lib. 1816, A. fo. 1474.

Aug. —

KEENE and Others v. RILEY and Others.

Motion by simple contract creditors of one who had been a trader, but ceased to be so, and was not a trader at the time of his death, for a receiver, upon affidavit before answer, refused; not being within the statute 47 *G.* 3. sess. 2. c. 74.

THE plaintiffs moved for a receiver, upon certificate of bill filed, and affidavits.

The affidavits stated, that the plaintiffs were simple contract creditors of the late Mr. *Riley*, who, for some time previously, and down to the time of his death, was a trader; that one of the defendants was his executrix, and the others his devisees and heir; and that the executrix and devisees were wasting the real and personal estates, &c.

The defendants, by affidavits in answer, positively swore, that the testator, although he had formerly been a trader, had ceased to be such for a considerable time, and was not a trader at the time of his death.

Parker.

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Parker, in support of the motion.

Beames, *contrà*, contended, that, as the testator had not by his will charged his real estate with the payment of his debts, this Court had no jurisdiction to appoint a receiver; the testator not being a trader at the time of his death, so as to bring the case within the late act, 47 *G*. 3. sess. 2. c. 74. sect. 1

The *Lord Chancellor*, upon hearing the clause read, said that was his opinion.

No order made. (*a*)

(*a*) Communicated by Mr. *Beames*.

FORBES and Wife *v*. BALL and Others.

ROLLS. *Aug*. 11.

"I give to *A. C.* 500*l.*, and it is my will and desire that *A. C.* may dispose of the same amongst her relations, as she by will may think proper." Held, a trust for the relations of *A. C.* and the 500*l.* well bequeathed by the will of *A. C.* to her sister, and her sister's children, though made without reference to the will of the first testator.

Construction of words in a residuary clause, as having reference to a contingency which had not taken place, and therefore no restriction on a preceding absolute bequest.

DENNIS COTTEREL, by his will, (among other things,) gave as follows:—"I give to my dear "wife, *Ann Cotterel*, the sum of 500*l.*; and it is my "will and desire that my said wife, *Ann Cotterel*, "may dispose of the same amongst her relations, as "she by will may think proper." And, as to the residue of his estate, he bequeathed the interest and dividends to his said wife during her life, for her own proper use and benefit, and appointed her sole executrix and residuary legatee; with a proviso in

the

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the will, that, after her death, the residue of his said estate thereinbefore bequeathed to her for her life, should come to and be equally divided between the defendant, *John Cotterel* (his son), and the plaintiff, *Elizabeth Forbes* (his daughter), share and share alike: but if either of them, his said son or daughter, should die before that event should take place, leaving issue him or her surviving, then the part or share of him or her so dying should go to and be divided among his or her children, share and share alike; but, if either of them, his said son or daughter, should die without leaving issue him or her surviving, then the survivor should enjoy the interest and dividends during his or her life; and, after his or her decease without leaving issue as aforesaid, the whole should go to and be divided amongst his (the testator's) nearest relations.

Ann Cotterel (the testator's widow ånd executrix) proved the will, and possessed herself of his personal estate, and shortly afterwards died, having made her will, by which she gave and bequeathed to her sister (the defendant *Jane Ball*) and the defendant *Pawson*, "the sum of 500*l.* in trust to lay out the same in their "names, in the public funds, upon trust to apply and "retain the dividends to her said sister, for her own "use, for her life, for and towards the maintenance of "her children; and, after her death, to pay and divide "the said funds unto her children (who were also made "defendants) equally among them;" and she made her said sister her residuary legatee, and appointed her, together with *Pawson*, executrix and executor of her will.

The bill was filed by *Forbes* and his wife, claiming, in right of the wife, to be entitled, together with the defendant *John Cotterel*, to the absolute interest in the residuary

residuary estate of the testator, in equal moieties. By the decree made on the hearing, it was referred to the Master to take an account of the testator's personal estate received by or come to the hands of *Ann Cotterel* during her life, or of the defendants *Jane Ball* and *Pawson*, (her executors,) or either of them since his death, with the usual directions. The Master by his Report found (among other things) that *Ann Cotterel* purchased 1000*l.* bank stock with part of the testator's property which had been received by her, and that the defendants (her executors) since her death had sold the same, and invested 500*l.*, part of the produce, in the purchase of certain other stock, to answer the legacy of 500*l.* given by the will of the testator to the said *Ann Cotterel*, with power to dispose of the same amongst her relations as she by will might think proper.

The cause now coming on for further directions, the principal question raised by the pleadings was, whether the will of *Ann Cotterel* was to be taken as a due execution of the power of appointment given her by her husband's will of the 500*l.* thereby bequeathed to her as aforesaid; or whether the same fell into the residue of his estate by reason of the non-execution of the power:— And, as to this question, the plaintiffs insisted that *Ann Cotterel* never executed, or intended to execute, such power of appointment, and therefore the 500*l.* fell into, and then formed part of, the residuary estate of the testator. The defendants on the contrary insisted that the power was well executed by the will of *Ann Cotterel*; or, if not, that it was a trust for her relations subject only to her life-interest, and, if so, in default of the appointment, the defendant Mrs. *Ball*, as her next of kin, would be entitled absolutely. And they cited *Harding* v. *Glyn* (*a*), *Brown* v. *Higgs* (*b*), *Cruwys* v. *Col-*

(*a*) 1 Atk. 469. (*b*) 4 Ves. 708. 5 Ves. 495. 8 Ves. 561, &c.

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man (*a*), *Birch* v. *Wade* (*b*), &c. Upon this point, the Court was of opinion that the words in the testator's will raised a trust for the wife's relations, subject to her appointment; and that the same was well executed by her will in favour of her sister and her sister's children; and decreed accordingly.

The other question was, whether the plaintiffs, in right of the plaintiff *Elizabeth*, were entitled, together with the defendant *John Cotterel*, absolutely, or for life only, to the residuary estate of the testator; it being contended against the claim of the plaintiffs, that, although the first gift was absolute, yet the subsequent words restricted it to a life-interest. But, as to this the Court was of opinion that the subsequent words only referred to a contingency, which had not taken place, namely, the death of the legatees, or one of them, before the death of *Ann Cotterel*, and decreed accordingly.

Agar and *Horne* for the plaintiffs.

Cooke and *Roupell* for the defendants *Jane Ball* and her children.

" Declare, the sum of 500*l.* bequeathed by the will
" of the testator *Dennis Cotterel* was well bequeathed
" by the will of *Ann Cotterel* to *Jane Ball* and *Thomas*
" *Pawson* upon the trusts therein mentioned. And
" declare, the plaintiff *Elizabeth Forbes* entitled to a

(*a*) 9 Ves. 319.

(*b*) 3 V. and B. 198. See also, *Wright* v. *Atkyns*, 17 Ves. 255. *Parsons* v. *Baker*, 18 Ves. 476. *Prevost* v. *Clarke*, 2 Madd. 458. *Mahon* v. *Savage*, 1 Scho. and Lef. 111.

" moiety

"moiety of the clear residue of the testator's estate "absolutely, and the defendant *John Cotterel* absolutely "entitled to the other moiety."

Reg. Lib. A. 1816, fo. 1930. b.

Aug. 29.
Nov. 12, 17.

KENNEDY v. LEE.

In order to form a contract by letter, of which the Court will decree a specific performance, nothing more is necessary than that the amount and nature of the consideration to be paid on one side, and received on the other, should be ascertained, together with a reasonable description of the subject matter of the contract.

It is the clearly established doctrine that the Court will carry into execution an agreement so constituted It is not necessary to be satisfied that the parties actually meant the same thing, provided a clear assent be given to a certain proposition arising *de facto* out of the terms of the correspondence.

THE bill stated that, in and for several years before the year 1816, the plaintiff and defendant jointly carried on the trade or business of nursery gardeners and seedsmen, as partners, and in the course of the said trade or business purchased with their partnership monies, or otherwise acquired, for the benefit of their partnership, divers freehold, copyhold, and leasehold messuages, gardens, lands and tenements, and became possessed of a large stock in trade, and large sums of money became due to them as partners, and large sums of money out of the partnership property were expended in building walls, hot-houses, green-houses, and other buildings and improvements on the premises; and that they were entitled to the said partnership effects, and interested in the losses and profits of the said business, in equal shares. That the accounts of the partnership were usually taken and settled about *Midsummer* in every year. That, in the month of *April* 1816, the plaintiff gave to the defendant a verbal notice of his (plaintiff's) intention to dissolve the partnership at *Midsummer* then next ensuing, and the defendant verbally accepted such notice, whereupon some

discussion

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discussion took place between the plaintiff's solicitor and the defendant, as to the mode of dissolving the partnership, and, in the month of *October*, 1816, the defendant delivered to the plaintiff a valuation made by him (the defendant) of the messuages, &c., and effects belonging to the partnership, whereby the partnership property, exclusive of the bonds and book-debts, appeared to be under the value of 16,000*l.*; and at the same time the plaintiff caused an estimate of the same partnership property to be delivered to the defendant on his behalf, by which last-mentioned estimate the same property appeared to be of the value of 32,000*l.* or thereabouts. That the defendant proposed to give to the plaintiff the sum of 8000*l.* for the plaintiff's moiety, and the plaintiff thereupon wrote and sent to the defendant a letter, dated the 21st *October*, 1816, as follows:—"I did not wish to part with my concern in "the nursery altogether, until I had seen my son *Lewis.* "As I received a portion of the property in hereditary "succession, I considered I ought to consult the right- "ful successor to the business, although the whole right "may rest with me in the disposal of it. We yester- "day morning canvassed the matter, and he has no ob- "jection to the sale of it, but from the low estimation "you seem to form of the concern, which certainly has "attained its apex in this line of business, from the very "large sums and sacrifices which have been expended "and made to promote this end. Now, although the "business of the last year did not realize as much as "the antecedent ones, yet, upon a calculation of the "amounts for the last twelve years, the average of "receipt has been upwards of 1500*l.* *per annum* each, "and, upon an average of six years last, 1800*l.* *per* "*annum*, besides the rent of houses, taxes, coals, &c., "which have been paid from the joint stock, making the "sum in the last six years equal to 2000*l.* *per annum*

"each,

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"each, besides the very great accumulations to the "book-debts, and the large sums added to the aggran-"dizement of the nursery. Now, the 2000*l. per annum* "alone, at 5 *per cent.*, is 40,000*l.*: but, put it as ac-"quired by business, and consequently attention and "labour required, say 10*l. per cent.* clear, this makes "the value of such a business so producing, worth at "least 20,000*l.* upon the lowest average."——"I must "own, I wish you to have it in preference. As to "taking any securities for part of the money, I have "no sort of objection, and that the book-debts may "be either divided or collected by either of us, as we "may choose, or taken at a sum certain. If you will "have the goodness to put your ideas upon paper to "me, I shall be obliged; as, although unwillingly, yet "I come prepared to say, that if you are willing, "and think so poorly of the affair, I will certainly, "against my inclination, still continue in business, by "offering you in cash any sum in reason you shall pro-"pose for its value, as my son thinks we perhaps may "be able to manage it together." That, in reply, the defendant wrote and sent to the plaintiff a letter bearing date the 23d of *October*, 1816, as follows: "Dear "Sir,—As you think the just value of the nursery is "20,000*l.*, and add that you and your son can carry "it on without much difficulty, I will readily sell you "my inheritance of it for 10,000*l.*; and, that no oppo-"sition may stand in the way of your wishes, I will also "sell you *Butterwick* at its fair value. I will also sell "you my garden for what it has cost me, the best cul-"tivated spot in *England* for its size, and the most pro-"ductive." The bill then proceeded to state, that *Butterwick* and the garden mentioned in the defendant's letter were the sole property of the defendant, and that the plaintiff did not desire to purchase them, but accepted the defendant's offer to sell his share in the part-

nership

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nership property at the price of 10,000*l.*, and accordingly, on receipt of his letter, wrote to the defendant as follows, *October* 26, 1816: "Dear Sir, — Allow me "to ask you in what time and manner you would propose to have the whole 10,000*l.* paid, as offered in "your last letter." In reply to which, the defendant wrote and sent to the plaintiff another letter, as follows: "Dear Sir, — You know I have a large family, I therefore cannot be idle. As I mean to carry on business, "I shall want the cash, either to go into partnership, "or to raise a nursery by myself. There is no doing "this without money.. In regard to the book-debts, "they may be divided as collected half-yearly, or annually, or as fixed upon. The bonds may be divided." And that thereupon the plaintiff wrote again to the defendant as follows: 28th *October*, 1816. "Dear Sir,—I "agree to give you 10,000*l.* as you mention, for your "moiety of all your partnership premises, stock, business "and concern, excepting our bonds and book-debts, comprising therefore our copyhold called *Swansfield*, our "freehold at *Feltham*, our leasehold at *Stanwell*, our various leaseholds and nurseries in the parish of *Hammersmith* and *Fulham*, with all the erections, buildings, "and all green-houses and plants and improvements "made thereon, and all our stock in trade, instruments "and utensils, and all other our partnership property, "except the bonds and book-debts as above mentioned. "I am prepared to pay the sum as soon as the proper "conveyances and deeds can be made out, and I would "therefore beg you to let me have the title-deeds and papers concerning the premises, that my solicitor may "prepare the necessary papers without delay. I will divide the bonds, and arrange the book-debts with you, as "you mentioned." Another letter of the defendant's without date, but supposed to be of the same date with the preceding letter of the plaintiff's, was also in evidence be-

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tween the parties, although not stated in the bill nor referred to by the answer, *viz.* "Sir,—I propose the following conditions, which I mean to lay before my friends, "with your proposal, before I put my name to any "thing, as I have not consulted any one yet. The "partnership to cease *Midsummer*, 1817. The stock "of *Butterwick* to be taken by Mr. *Lee*, according to Mr. *Kennedy*'s valuation given in. Mr. *Lee* "to remain in his house until he can conveniently "remove after *Midsummer*, &c. When I have consulted my friends, you shall hear further." The bill then insisting that by the aforesaid letters a binding contract had been made between the plaintiff and defendant for the plaintiff to purchase, and for the defendant to sell, his moiety of the partnership property, exclusive of bonds and book-debts, at the price of 10,000*l.* prayed that the defendant might be decreed specifically to perform the said contract, and to convey and assign to the plaintiff all the partnership property, exclusive of the bond-debts, and book-debts due thereto, the plaintiff being thereupon ready and willing to pay the said sum of 10,000*l.* to the defendant, and that the bond-debts and book-debts might either be collected, and the produce thereof divided between the plaintiff and defendant, or that the same might be divided, and one moiety thereof assigned to the plaintiff and the other moiety to the defendant; and, in case the Court should be of opinion that the contract ought not to be performed, then that the partnership might be dissolved, and the accounts thereof taken, and the property sold and divided between the plaintiff and defendant; and that in the mean time the defendant might be restrained from carrying on the business of the partnership, and from acting as the partner of the plaintiff, and that some proper person or persons might be appointed to manage and conduct the said business, and to collect and receive the debts due to the partnership.

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The defendant by his answer denied that the plaintiff ever gave him notice of his intention to dissolve the partnership at *Midsummer*, or that any thing passed between them relative to a dissolution (more than some hasty words dropped in the course of a dispute which took place in the month of *April* preceding, but which by no means amounted to such notice) until the 22d of *August*, 1816, when the plaintiff's solicitor wrote to the defendant a letter, reminding him of the conversation which then passed between them, and pressing an immediate and final settlement. He said that, after receiving this letter, he had some further conversation with the plaintiff on the subject, when the latter gave his reasons for wishing a dissolution. He admitted the valuations made on each side, and the correspondence, alleging that he never conceived himself to be bound thereby, but only considered the proposals made in the light of a treaty; submitting, therefore, that no binding contract or agreement had been made between them; that the plaintiff had given to the defendant no notice which amounted to a dissolution of the partnership, and resisting the appointment of a receiver and the injunction.

The questions in the cause were first brought before the Court upon a motion by the plaintiff for a receiver and an injunction, according to the prayer of the bill. His Lordship, after hearing the counsel on both sides, requested to be informed if the parties were willing that the cause should be considered as having come on to be heard on bill and answer; and, the parties having intimated their consent that it should be so considered, the motion stood over till the last day of the Sittings after *Trinity* Term, when His Lordship, after stating and minutely commenting upon the terms of the correspondence between the parties, expressed his opinion on the case, as follows:

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The LORD CHANCELLOR.

The question is, whether this correspondence, closing thus with an offer, has formed a binding contract. Now, in order to form a contract by letter, I apprehend nothing more is necessary than this; that, when one man makes an offer to another to sell for so much, and the other closes with the terms of his offer, there must be a fair understanding on the part of each, as to what is to be the parchase-money, and how it is to be paid, and also a reasonable description of the subject of the bargain. The defendant, Mr. *Lee*, I am satisfied, was not aware of the precise effect of this correspondence: but I am afraid, be that as it may, if the letters amount to a contract, so considered, that the plaintiff has a right to have the contract specifically executed. After the letter of the 28th of *October*, Mr. *Lee* writes a letter, in which he says he will sign nothing until he has consulted his attorney or friend. Then the question is, whether this letter, being actually signed by *Lee*, can be taken to be a contract already entered into with Mr. *Kennedy*? With regard to that, it appears to me, when *Lee* makes an offer of selling his share in the nursery for 10,000*l.*, and also *Butterwick* and the garden at the sum which they cost him, that 10,000*l.* was the sum which was asked for the nursery, independent of any proposal for *Butterwick*. Whether he took *Butterwick* or not, it was the same thing: but he might take it if he pleased, at the sum it had cost the defendant. *Kennedy* (the plaintiff) then writes to know, in what time and manner he would have the money paid, and he makes the offer of 10,000*l.*, if the time and manner of the stipulated payments should be convenient. *Lee* (the defendant) writes him back that the time and manner would be as soon as the title deeds were made out. This then was an agreement on one side, and, if accepted by the other, was binding on both, although it should turn out to be a surprise on the one or the other. It is binding on *Lee*, unless *Kennedy*,

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in his subsequent letter of the 28th of *October*, has gone beyond the fact in the description of the articles which are really comprised under the denomination of the nursery concern. If the description of the property is correct in what it points out as being the nursery concern, it appears to me that this is a binding agreement between these parties: but, if it goes beyond that, it must so far be considered as a new proposition, and must be treated as such; and then it would be exceedingly difficult to say it was binding. In other words, if the detail of the subject in the last letter truly describes it as the nursery concern, I think the bargain is completed: but, if that is not an accurate view of the property, I am not prepared to say the contract is complete.

I do not mean to conclude you, however, by what I now say. I think it is a hard case on Mr. *Lee*: but you may understand that this is my judgment upon it, unless the parties wish to have it re-argued at the next seal. I cannot grant a receiver of this property; because, if this be a binding contract, whom should I appoint to receive it? and, if it be not a binding contract, I have no right to appoint a receiver.

In consequence of the intimation at the close of the preceding observations, the case was now argued afresh before the Lord Chancellor.

Leach and *Horne*, for the defendant.

Sir *Samuel Romilly*, *Bell*, and *Shadwell*, for the plaintiff.

On behalf of the former, it was urged that the plaintiff's letter of the 28th of *October*, 1816, was manifestly not a simple acceptance of the defendant's offer contained in his letters of the 23d and 26th of that month, because the plaintiff there expresses his agreement to give 10,000*l.* for the defendant's moiety of the partnership premises,

premises, stock, "business and concern," by which last word it was contended that the good will of the business must be meant, which the defendant had never offered, and had never for a moment intended to part with. And this, it was said, was manifest from the whole tenor of the correspondence, in which the defendant invariably spoke of his continuing in business; that the good-will of such a business was alone of very considerable value; and that no price had been specifically set upon it in either of the estimates. That it was according to frequent practice for one partner to sell to another the partnership stock and effects, &c. without including the good-will, which was always considered as a distinct property, and capable of separate assignment; and that, in this case, the insertion of it in the plaintiff's letter must be viewed as a surprise on the defendant, of which a Court of Equity would not allow any advantage to be taken, or, if otherwise meant, as forming the basis of a new treaty, of which the letter in question was only the commencement. But, if it were to depend on the original offer, and its acceptance, they still contended that the offer itself, *viz.* "to sell the inheritance of the nursery "for 10,000*l.*" did not contain any expression of those matters, which in His Lordship's opinion it was necessary to have expressed, in order to form a binding contract; saying nothing as to time, manner, possession of the property, or dissolution of the partnership; mentioning nothing but price; and leaving every thing else to future arrangement. Besides which, it was again urged that this offer, properly construed, was an offer to sell the share of the nursery at 10,000*l.* and *Butterwick* also, at a price to be ascertained; and that an acceptance as to one part only could not be considered as forming any contract, since there was no offer to sell the one without the other.

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With respect to cases in which the Court, though it would not set aside an agreement which had been actually carried into execution, would either decree an agreement which had not been created to be delivered up, or would interfere neither in the one way nor in the other, but leave the parties to law, *The Marquis of Townsend* v. *Stangroom* (*a*) was cited.

The LORD CHANCELLOR.

Whether it might be better, or not, that this Court had never entertained such suits for the specific performance of agreements which are left to be made out by the terms of a correspondence between the parties, as the present, it cannot, however, be disputed that it has been long since settled, as the doctrine of the Court, that such agreements, when clearly made out, will be established; and that, if a correspondence is of such a nature as, according to the rules of sound legal interpretation, would amount to an agreement, the agreement so constituted will be carried into effect in the same manner as if it had been regularly drawn up in the form of articles of agreement, and signed by the parties as such—that, in fact, the Court will, in all such cases, regard, not the form of the agreement, but the substance, whether or not, *in point* of fact, such an agreement has been entered into; in the same manner as, where the agreement contains a proviso, in the nature of a penalty, in case of breach of the agreement, a specific performance will nevertheless be denied, as if no such proviso had been inserted. (*b*)

(*a*) 6 Ves. 328. See *Willan* v. *Willan*, 16 Ves. 83. Sugd. Vend. and Purch. *passim*.

(*b*) *Howard* v. *Hopkins*, 2 Atk. 371. And see Sugd. Vend. & Purch. 183. (4th. Ed.)

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It must be understood, however, that the party seeking the specific performance of such an agreement, is bound to find in the correspondence, not merely a treaty—still less, a proposal—for an agreement; but a treaty, with reference to which mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance, which makes it no longer the act of one party, but of both. It follows that he is bound to point out to the Court, upon the face of the correspondence, a clear description of the subject matter, relative to which the contract was in fact made and entered into. I do not mean, (because the cases which have been decided would not bear me out in going so far,) that I am to see that both parties really meant the same precise thing, but only that both actually gave their assent to that proposition which, be it what it may, *de facto* arises out of the terms of the correspondence. The same construction must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument —the only difference between them being, that a letter, or a correspondence, is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion.

It must also be understood, that, in a case where there has been, on one hand, a general proposal, and on the other an acceptance of that proposal, expressly leaving some particulars essential to the subject matter of the agreement to be afterwards settled, there is no evidence before the Court of such a contract as the Court can enforce upon the ground of the cardinal points having been agreed to between the parties.

[His Lordship then again went through the several facts of the case, as connected with the correspondence,

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and proceeded to consider the terms of the correspondence itself.]

Good-will of a trade, in two distinct senses, as between a continuing and a withdrawing partner; one, as it necessarily arises out of, and is connected with, ownership; the other, where it is made matter of contract, as, not to carry on the same trade, or not within a certain distance, &c.

Where two persons are jointly interested in trade, and one by purchase becomes sole owner of the partnership property, the very circumstance of sole ownership gives him an advantage beyond the actual value of the property, and which may be pointed out as a distinct benefit, essentially connected with the sole ownership. In the case of the trade of a nursery-man, for instance, the mere knowledge of the fact that he is sole owner of the property, and in the sole and exclusive management of the concern, gives him an advantage which the other partner, supposing him to carry on the same trade, with other property not the partnership property, would not possess. In that sense, therefore, the good-will of a trade follows from, and is connected with, the fact of sole ownership. There is another way in which the good-will of a trade may be rendered still more valuable; as by certain stipulations entered into between the parties at the time of the one relinquishing his share in the business; as by inserting a condition that the withdrawing partner shall not carry on the same trade any longer, or that he shall not carry it on within a certain distance of the place where the partnership trade was carried on, and where the continuing partner is to carry it on upon his own sole and separate account. Now it is evident that, in neither sense, was the good-will of this trade at all considered as among the subjects of the valuation to be made by either party. It was not so considered by the plaintiff when he wrote his letter of the 21st of *October*. The words "concern" and "inheritance" are used inartificially, and cannot be construed as having any reference but to the actual subjects of valuation. And, when the plaintiff offers to take the business himself, he could not have forgotten that the defendant's

defendant's own estate of *Butterwick* lay contiguous to the partnership property, and therefore his introducing no stipulation with reference to the fact of its contiguity is a clear intimation that when he wrote this letter, he had no intention, in offering to take the partnership property, to purchase with it the good-will, in the sense of restricting the defendant from carrying on trade in its vicinity. In that sense, at least, therefore, the good-will of the trade was not the subject of contract, or treaty even, between the parties.

Then comes the defendant's letter of the 23d, which shews that the defendant had then so far departed from his original determination as to make an offer to the plaintiff of his estate of *Butterwick* and the garden, besides taking his share of the partnership property. He considers the plaintiff by his letter of the 21st as having made him an offer to purchase his share of the partnership property for 10,000*l.*, and he accepts that offer, and at the same time tenders to the plaintiff the purchase of *Butterwick* and the garden upon certain terms therein referred to, if he will have them. This acceptance and this offer are not necessarily connected. On the contrary, I cannot look at this letter, with reference to the offer of *Butterwick*, as any thing more than a new and distinct proposal on the part of the defendant, which the plaintiff might, or might not, close with, but which, in either event, could have no bearing upon the cardinal points of the agreement, which must now be considered as settled. Where one man writes to another a letter containing an offer, which the other accepts, that acceptance gives to the person making the offer, an immediate right to say to the other,—As soon as I can shew that I have the means of carrying my offer into execution, I am entitled to claim the benefit of your acceptance in the completion of the agreement.

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If, then, the bargain had been struck on the 23d of *October*, by an immediate answer from the plaintiff, no question could possibly have arisen about what was intended as the subject-matter of the contract between the parties, with reference to the good-will, since it is plain that nothing was understood or agreed to be sold but the good-will necessarily arising from the mere fact of accidental ownership. However, instead of a direct immediate acceptance on the part of the plaintiff, there passes some further correspondence as to the time and manner of payment, after which comes the plaintiff's concluding letter of the 28th of *October*; and, upon that letter, the true question is, whether it amounts to a final acceptance of the defendant's offer, regard being had to what had passed in the intermediate time. And, if by the words "business and concern," the plaintiff can be fairly taken as having meant any thing more than the property which was the original subject of valuation between the parties,—that is, than the specific articles constituting the property of the partnership, together with that sort of good-will which arises from, and is inseparably attached to, the sole ownership, I am of opinion that he must be considered as having introduced a new term into the subject matter of the agreement, and therefore not to be entitled to a specific performance of any part of that agreement. But, upon the whole correspondence, and the facts of the case, taken together, I cannot but think that this letter is a virtual acceptance of the agreement made by the defendant to close with the plaintiff's original offer, and that, if more was meant, it is not so expressed as to vitiate the agreement, or to constitute the terms of a new and additional proposal. I have always understood the law of the Court to be, with reference to this sort of contract, that, if a person communicates his acceptance of an offer within a reasonable time after the offer being made,

made, and if, within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the Court will execute. I apprehend, therefore, that it is not competent to the defendant to say, I made my proposal on the 23d—you propose terms of arrangement on the 26th, and do not finally agree to my proposal before the 28th; therefore, there is no binding agreement between us—I will not now carry into effect my proposal such as you have agreed to accept it. It is not in the defendant's power, after this, to add terms in modification of that agreement.

Upon the whole, my opinion is this—that the terms of the contract, and its subject-matter, are sufficiently stated; but that the plaintiff has no right, according to the contract, to claim any good-will in the trade in addition to the partnership property which is the subject of it, except what is the necessary effect of his acquiring the sole ownership in the property—certainly not such as to preclude the defendant from carrying on the same trade, where, and when, and with whom he pleases.

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Nov. 13. 17, 18.

BISCOE *v.* WILKS.

Specific performance decreed, with costs, in a case, where the defendant, objecting to title, had been served with notice of a prior decision in a different cause in favour of the same title, against a similar objection.

THIS was a bill for a specific performance, filed by the same parties as were plaintiffs in the case of *Biscoe* v. *Perkins* (reported, 1 Ves. & Bea. 485)., against *Wilks*, as the purchaser of other lots of the same estate, and at the same sale at which *Perkins* had purchased the lots which were the subject-matter of the specific performance sought and decreed in the former cause. The present bill charged the filing of the bill in *Biscoe* v. *Perkins;* that *Perkins* (the defendant in that suit), by his answer, alleged that the plaintiffs could not make a good title, for the reasons stated in the report above referred to; and that that cause came on to be argued before the *Lord Chancellor*, when His Lordship, notwithstanding the arguments of the counsel for the defendant, decreed a specific performance. That an accurate note of His Lordship's judgment having been taken by a short-hand writer, employed on behalf of the plaintiffs, a copy thereof was afterwards served on the defendant *Wilks*, who, nevertheless, refused, and still persisted in refusing, to complete his agreement.

Wilks, by his answer, admitted that he had refused, and said that he did so refuse by reason that he was advised the plaintiffs were unable to make a good title. He did not know whether the objection stated in the answer had, or had not, been insisted on by the counsel for the defendant *Perkins* at the trial of the former cause, nor whether the note of the *Lord Chancellor*'s judgment which had been delivered to him was, or was not, accurate. He then stated the grounds of the objection taken by him to the title, which were the same as those of the objection taken in *Biscoe* v. *Perkins;* and he insisted that, therefore,

fore, he ought not to be compelled to complete his contract. 1817.

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This cause came on to be heard before the *Lord Chancellor*, when his Lordship decreed the agreement to be specifically performed; but upon the question of costs, it was suggested to the Court that the same question had occurred in another cause, which was then before the House of Lords, on appeal, the name of which was not stated. His Lordship therefore ordered the question of costs to be reserved, that the counsel for the defendant might be at liberty to ascertain and state to the Court what were the circumstances of the case referred to. 13 *Nov.*

This day the principal case was again mentioned, and nothing was said on the part of the defendant; when his Lordship was pleased to order that, if no case was produced the next day, the defendant should pay the costs of the suit. 17 *Nov.*

No such case being produced as that referred to, the order was this day made accordingly. 18 *Nov.*

Leach and *Newland*, for the plaintiffs.

Sir S. *Romilly*, *Trower*, and *Glyn*, for the defendant.

Reg. Lib. A. 1817. Fo. 649.

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Nov. 22.

Between WILLIAM SIMS, - - PLAINTIFF,

AND

MATILDA RIDGE, (Widow and Administratrix of J. H. RIDGE, deceased,) J. COCKS, J. S. COCKS, and GEORGE RIDGE, - DEFENDANTS:

And between the said GEORGE RIDGE, PLAINTIFF,

AND

The said MATILDA RIDGE, DEFENDANT.

In case of unreasonable delay in prosecuting a decree in a suit by next of kin against an administratrix, the Court will give leave to a creditor to prosecute a decree which has been so neglected.

THIS was a motion, on the part of the plaintiff in the first cause, that he might be at liberty to go before the Master to whom the second cause stood referred, and to prosecute the said second cause as if he were a party thereto; and to examine the defendant, *Matilda Ridge*, and such other persons as he might be advised, upon interrogatories in the said second suit; and that the said defendant might be ordered forthwith to pay into Court in the second cause, to an account to be entitled, "The Account of *J. H. Ridge*, the Intestate," the amount of the money received by her from the sale of the intestate's effects, and all other monies received by her on account thereof, to be verified by affidavit; and that the costs of the plaintiff in the first-mentioned cause, and of the present application, might be taxed as between solicitor and client, and paid by the defendant out of the intestate's estate.

By the affidavit of the plaintiff *Sims*' solicitor, it appeared that, on the 14th of *November*, 1816, an action was commenced in the Common Pleas, at the suit of the plaintiff, against the defendant, *Matilda Sims*, as widow and administratrix, upon the joint and several bond of the intestate and others, for 4900*l.*: that the defendant, the administratrix, appeared to that action, and (as the

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deponent believes) for the purpose of defeating it, confessed a judgment at the suit of the two defendants *Cocks* and the defendant *George Ridge*, for 140,000*l.* (which judgment appeared to be signed on the 19th of *November*, 1816); and, on the 26th of the same month, filed a special plea of such judgment. That, in consequence of such plea, the deponent (the plaintiff's solicitor) on the 28th of the same month informed the solicitor for the administratrix, that his client would not be satisfied until the intestate's affairs had been properly investigated, and that his only remedy was to file a creditor's bill against the administratrix, and, on the 2d of *December*, he made the same communication to the solicitor for the other defendants. That neither of these solicitors intimated to the deponent any intention of filing a bill, and, consequently, the deponent, on the 16th of *December*, instituted the first-mentioned suit, and, on the 19th, gave the solicitors for all the defendants information of its being instituted, and of the subject of it. That neither of the defendants appeared to the bill for a considerable time after it was filed; but, on the 27th of *January*, 1817, the deponent was surprised to see an advertisement for creditors of the intestate to come in and prove their debts before the Master, pursuant to a decree in a cause of *Ridge* v. *Ridge*, which was the first notice he had had of the existence of the second of the above-mentioned causes; and, if he had known of it, he should not have proceeded in the suit which he had instituted. It appeared that the bill in this second cause was filed on the 13th of *December* by *George Ridge*, (one of the defendants in the first cause,) as one of the intestate's next of kin, claiming a share of the surplus. That, on the 21st of *December*, the administratrix put in her answer, without oath, and not setting out any account; and that the decree was made by consent, on the 23d of the same month. That the deponent was afterwards informed, by

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by *George Ridge*'s solicitor, that the cause of *Ridge* v. *Ridge* had the same object with that of *Sims* v. *Ridge*; that the accounts should be passed, and the suit prosecuted, with as little delay as possible; and that, if the plaintiff *Sims* would prove his debt, his costs should be paid out of the intestate's estate, as he had had no notice of the decree. That the plaintiff *Sims* consented thereto, and thereupon the sum of 4900*l.*, for principal money and interest on his debt, and 8*l.* 6*s.* 10*d.* for his taxed costs at law, were allowed him before the Master. That, on the 11th of *November*, 1817, the deponent made enquiry at the Master's office if the examination of the administratrix, in the cause of *Ridge* v. *Ridge*, had been carried in, and was informed of the contrary; and that it appeared no warrant had been taken out, since the first seal, before the present term, to compel her to pass her accounts as administratrix.

This statement was met by an affidavit on the part of *George Ridge*, (defendant in the first, and plaintiff in the second cause,) explaining the nature of the debt, (a *bonâ fide* debt from the intestate to the house of *Cocks* and *Ridge*, bankers,) to secure which debt the bond was given, on which judgment had been entered up as aforesaid. It stated that judgment had been so entered up thereon, with the consent of the administratrix, to avoid litigation, an action having been previously commenced on the bond, and all the defendants being ignorant of the action commenced by the plaintiff; and that, afterwards, when the plaintiff's solicitor enquired concerning the debt, and was informed of its nature, he expressed himself satisfied, and intimated no intention of instituting any proceedings to investigate the intestate's accounts. That the affairs of the intestate being much embarrassed at the time of his death, and it being represented to *George Ridge*, (who was the father, and one of the

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the next of kin of the intestate,) that many claims on his estate were connected with usurious and illegal transactions, which it would be well to investigate by means of a suit in equity, the said *George Ridge* gave directions for such suit to be commenced, and which was commenced accordingly on the 13th, and the decree made on the 23d of *December*, as above stated, which decree was duly passed and entered as soon as the same could be procured to be passed by the register, and interrogatories for the examination of the defendant administratrix left in the Master's office on the 23d, and allowed by him on the 31st of *January* following. That, in consequence of the advertisement for creditors, debts to a considerable amount had been proved before the Master, and, among others, the debt due to *Cocks* and *Ridge* as aforesaid; and other claims to the amount of many thousands, had been made on the estate, which were then in a course of administration; besides which there were debts due to persons beyond the seas, who would be excluded the benefit of the decree, unless sufficient time were allowed them to come in and establish their claims. That warrants were taken out on the 18th and 21st of *July*, returnable on the 21st and 25th respectively, for the administratrix to bring in her examination; and the Master had himself thought fit, under the circumstances, to allow her time till the 1st of *November* for that purpose. That, since the expiration of that time, the deponent had often applied to the defendant, the administratrix's solicitor, to put in the examination, and he had promised to do so, stating, however, that the monies in the hands of the administratrix were to an inconsiderable amount, and that the assets of the intestate consisted almost wholly of a debt due from a person resident in the *East Indies*, which they were taking proper steps to recover. The affidavit proceeded to state that the suit of *Ridge* v. *Ridge* was

instituted

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instituted for no other purpose than that of procuring an account of the intestate's personal estate and the administration thereof, in a due course, under the indemnity of the Court; that no improper or unnecessary delay had taken place in the conduct of it; and the deponent had from time to time acquainted the plaintiff *Sims*'s solicitor, with the state of proceedings, on which he never intimated any dissatisfaction, or complained of any delay, till the 11th of *November*, 1817, when notice was given of the present application.

Sir *S. Romilly* and *Roots*, in support of the motion, referred to the case of *Powell* v. *Wallworth* (*a*) before the *Vice-Chancellor*, where leave was given to a creditor to prosecute a suit, the decree in which had been made some time before, and had never been prosecuted.

Sir *Arthur Piggott* and *Dowdeswell*, contrà, for *George Ridge*, (one of the defendants in the first, and plaintiff in the second cause.)

There is no instance of the Court taking out of the hands of the next of kin a suit instituted by him, to put it into the hands of a creditor. The suit so commenced must necessarily involve accounts of all debts and demands on the estate; and the Court will take care that the purposes of justice shall not be defeated by it. It is said the estate is insolvent, and therefore there is no interest in the next of kin to prosecute the suit; but no proof is offered of this, nor of any unnecessary delay in the conduct of the suit. The case cited does not bear out the application now made, and no other authority has been mentioned.

(*a*) 2 Madd. 183.

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Agar, for the defendant, the administratrix.

The motion, as against Mrs. *Ridge*, must certainly be refused. The Master thought fit to give her till the last seal to put in her examination, and no time has since elapsed to justify such an application.

Sir *S. Romilly* in reply.

I certainly do not recollect any instance of this sort of application being granted; but it is surely even more consistent with reason to allow a creditor to prosecute a suit commenced by the next of kin (where there has been delay in the prosecution) than to prosecute a creditor's suit. In many instances, it may be for the interest of the next of kin to delay proceedings: but that cannot be the case with a creditor's suit. The present case is very peculiar. Here the next of kin suing is also a principal creditor, and he *chooses* to file the bill in the character of next of kin, and not of creditor. I admit that it depends on the question, whether there has, or has not, been any improper delay: but here, how can they account for the delay between the settling of the interrogatories and taking out the warrants for the widow's examination? If any excuse for delay is afforded by the circumstance of the great debt coming from *India*, that, at least, affords ground for the appointment of a receiver, which ought to have been applied for.

The LORD CHANCELLOR.

It is admitted, that if the suit, which this is an application for leave to prosecute, had been a suit commenced by creditors on behalf of themselves and all other creditors of the intestate, the application would not have been very unusual. Undoubtedly, the practice ought to be so; because one creditor may very well be the friend of the party or his representative, and inclined

unjustly

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unjustly to favour the estate; and the Court will go further, for the purpose of prompting to diligence, even to the extent of giving costs to the party making the application. I remember when, where a decree had been obtained by a residuary legatee, a creditor was not allowed to come in under such decree; and it was determined that he should be admitted to do so, upon principles fully as much applying to the case of the next of kin suing an administratrix, as of a residuary legatee suing an executor. Supposing, therefore, there should be no authority at all to be produced in favour of this application by a creditor, where the suit has been instituted by the next of kin, I should yet have no hesitation in saying that he ought to be allowed to prosecute the suit, if there is sufficient proof of want of reasonable diligence. Formerly, by bringing an action, a man might have recovered a debt due to him from the estate of the deceased. But if, according to the present practice, he may be prevented by the institution of an amicable suit, it is obvious what will be the case with all creditors, unless leave is given them to prosecute in the event of improper delay.

[In the present case, His Lordship made no immediate order, but was pleased to direct that the motion should stand over until the second seal after Term, when the plaintiff was to be at liberty to state to the Court how the examination had in the mean time been proceeded with.]

It appears from the register's book, that an order was afterwards made, (it should seem by consent,) that the defendant do, within four days after personal notice thereof to her clerk in Court, put in her examination

to

to the interrogatories allowed by the Master; or, in default, a serjeant-at-arms should apprehend her, and bring her to the bar to answer her contempt; whereupon such further order should be made as should be just.

Reg. Lib. B. 1817. fol. 617. (*Nov.* 25, 1818.)

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SIMS *v.* RIDGE.

DIPPER *v.* DURANT.

Nov. 28.

Amendment of bill, after exceptions allowed, and not answered, does not prejudice an injunction previously obtained. Therefore, a motion of course for leave to amend, and that defendant may answer amendments and exceptions together.

THIS was a bill for an injunction to stay proceedings at law. The common injunction had been obtained; and the defendant had since put in an answer, to which exceptions were taken.

Treslove, for the plaintiff, now moved, as of course, for leave to amend, without prejudice to the injunction, and that the defendant might answer the amendments and exceptions together. The register had expressed a doubt whether this was a motion of course: but *Treslove* said he apprehended that it had been expressly decided so to be by his Lordship.

The LORD CHANCELLOR

Said that it was of course, so long as the defendant had not put in a further answer (*a*); and made the order accordingly.

Reg. Lib. A. 1817. fo. 120.

In the order, nothing is said as to the injunction being saved; which agrees with the case before the *Vice-Chancellor* referred to in note (*a*).

(*a*) See *Adney* v. *Flood*, 1 Madd. 449, where the Vice-Chancellor says, the words "without prejudice to the injunction" were unnecessary; for in this case the amendment would not affect the injunction. It was there moved specially upon notice

1817.



Rolls.
Dec. 2.

BURKETT and WIFE (and Others) Plaintiffs;

and

RANDALL (and Others) - Defendants.

(By original bill and bill of revivor.)

Bill by devisees praying a conveyance upon the ground of an alleged equitable title in the testator originating in an agreement, which was denied by the answer, but supported by evidence of ownership, as the receipt of rents and profits, &c.

Issue directed to try whether the testator was at his death beneficially entitled.

THE bill stated that *John Soan* (defendant to the original bill,) being seised in fee of the premises in question, subject to a lease for twenty-one years commencing at Christmas 1787, agreed to sell the same, subject to such lease, to his brother *Thomas Soan*, for *500l.* That, in pursuance of such agreement, he delivered up the title-deeds, and received the purchase-money, but no conveyance had ever been made. That *Thomas* thereupon entered into receipt of the rents and profits, and on the 4th of *July*, 1797, he, (*Thomas*) as owner of the premises, granted a lease for ten years, and on the 26th of *May*, 1800, a further lease for forty years, to the then tenant under the lease of 1787, on the surrender of his original lease; and that both the new leases were subsequently assigned to *Leaver*, (one of the plaintiffs) who was in possession under the same. That, in 1810, *Thomas* died, having by his will given to his brother *John* the rents and profits of these premises (among others) for his life; and the residue of all his property, real and personal, in trust for the plaintiff *Harriet Burkett*, and having appointed *Smith* and *Hibbert* (plaintiffs) and their heirs, &c. trustees and executors, who proved the will. The bill further stated that in *Hilary* term 1812, the defendant *John Soan* commenced an action of ejectment against the plaintiff *Leaver*; the term for which the original lease of 1787 was granted having expired in 1808, and no claim being then set up, nor any call made on *Thomas Soan* during his life-time to account for the subsequent rents and profits. The bill prayed that the defendant

might

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might be decreed to make to the plaintiffs (*Smith* and *Hibbert*) devisees in trust of *Thomas Soan* deceased, a proper conveyance, subject to the life interest of the defendant under his will; a reference to the Master to settle such conveyance, and an injunction to stay proceedings in the ejectment.

The defendant *John Soan* having died, the suit was revived against his representatives, who, by their answer, stated that the title deeds were delivered by the said defendant to his brother *Thomas* only in order to make him a qualification for a sporting licence. They denied the alleged agreement, and also denied that the defendant had received any consideration. They insisted that, if any leases had been made by *Thomas* (about which they knew nothing) they were fraudulent and void; and although they admitted that *Thomas* had been in receipt of the rents and profits, they said that he received the same only as agent for, and duly accounted for the same with, the defendant; or, if he did not always duly account, that it was only by the permission of the defendant that he was allowed to retain the same. And they further added that by his will the said defendant had given these premises (among others) to the then defendants (his representatives) expressly on trust for sale.

The answer was replied to, and the plaintiffs went into evidence in support of the allegations in their bill; which evidence was altogether circumstantial as to acts of ownership, &c. particularly as to *Thomas* having himself redeemed the land-tax.

The cause now coming on to be heard, Sir *S. Romilly*, *Hart*, and *Roupell*, for the plaintiffs, pressed for an issue.

Cooke

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Cooke and *Fisher*, for the principal defendants, opposed this application, insisting that there was no sufficient ground for directing an issue;—besides that, how was a court of law to determine, whether the plaintiff had an equitable interest? That the true question, whether the plaintiff had made out a case to entitle him to a specific performance, was for this Court to determine; and, if not, the bill must be dismissed.

Sir S. *Romilly*, in reply.

The bill is not for a specific performance, but to have a conveyance of the legal estate from parties who are mere trustees, upon the ground of an alleged equitable title; and the single question is whether, if the evidence is not sufficient to induce the Court to decree a conveyance, there is not at least enough to send it to a court of law to determine in whom the right to have the legal estate in the premises is vested? and he referred to a case of *Richmond* v. *Hughes*, before the Lord Chancellor, where such an issue as was now sought had been directed.

The MASTER *of the* ROLLS thought it was quite impossible to say that this was a case in which the bill ought to be dismissed, and at the same time held that the question upon the evidence was what this Court could not determine. It was therefore proper that an issue should be directed.

An issue was directed accordingly, "Whether the testator *Thomas Soan* was, at his death, beneficially entitled to the premises in question."

Reg. Lib. A. 1817. fo. 1050. b.

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Dec. 6.

EVANS *v.* RICHARDSON.

Agreement between a citizen of the United States and an *American* and *English* subject for the exportation of goods from *England* to *America* on their joint account in time of war, "provided a peace should not be likely to take place at the time of shipping the goods."

On a bill for an account, as a set-off against a separate demand, for which the defendant had brought an action against the plaintiff, an injunction which had been obtained on the filing of the bill was dissolved, on the ground of its being an illegal contract; although the goods shipped in pursuance of the contract did not sail till after a peace was made, and although the defendant had not relied on the illegality of the contract as a ground of defence, the Court itself setting up the objection.

THE plaintiff and defendant were citizens of the United States of *America*: the plaintiff a native of *America* usually resident there; the defendant a *Scotchman* usually resident in *England*.

In *Oct.* 1814, during the war between *England* and the United States, the plaintiff and defendant, being then in *America*, entered into a mercantile contract by letter for the exportation of goods from *England* to *America* on their joint account, and the goods were to be shipped by the defendant, "provided a peace was not likely to take place between the respective governments soon after his arrival in *England*."

When the defendant arrived in *England*, there were strong reports of peace, but no certain intelligence. The defendant therefore shipped the goods. About the time the goods were shipped, preliminaries of peace were signed, and before the ship actually sailed, it was publicly known that peace had taken place. Disputes having afterwards arisen between the plaintiff and the defendant, the defendant brought an action against the plaintiff upon a separate demand, and soon afterwards the plaintiff filed his bill, claiming a right to set off his share of the profits of the joint transaction against what was due from him on the separate demand, and praying an account of the profits of the joint transaction which

had

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had been received by the defendant; and an injunction to restrain proceedings in the action.

The injunction was obtained for want of answer. An answer was afterwards put in,—stating a correspondence, from which it was inferred that the contract had been abandoned.

An order *Nisi* to dissolve the injunction having been obtained, Sir *S. Romilly* and *Pepys*, for the plaintiff, now shewed cause against the injunction being dissolved; contending that the correspondence stated in the answer did not amount to an abandonment of the contract on the part of their client.

Leach and *Bickersteth* for the defendant were stopped by the Lord Chancellor, who said,

This is a contract, entered into between an *American* citizen and a person being both an *American* and an *English* subject, for a trading to *America* during time of war.

For the plaintiff.

The correspondence in which it originated was in time of war: but no actual trading took place till after a peace had been made

The LORD CHANCELLOR.

The bargain was made for a trading to be carried on in fraud of the laws of the country.

For the plaintiff.

The defendant has made no such objection.

The LORD CHANCELLOR.

It is of no consequence who makes the objection. If the

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the party has not, the Court will set it up. The plaintiff's letter, upon which the contract is founded, expressly says, "The vessel to be chartered, provided peace is *not* likely to take place." The first thing you have to do is to shew your contract, and, to do this, you produce a letter, in which you yourselves say, that if peace takes place, you will have nothing to do with the subject of it. Whatever the defendant may think proper, I am satisfied that the Court ought to raise the objection. The contract subsisting between the parties, was a contract to defeat the laws of the country.

For the plaintiff.

At the time the goods were shipped,—at all events before the ship sailed,—there was peace.

The LORD CHANCELLOR.

But no new contract had been entered into.

For the defendant.

Your Lordship then will dissolve the injunction?

Sir *Sam. Romilly* for the plaintiff.

No—The Court refuses to interfere, and will therefore leave the parties as they are.

The LORD CHANCELLOR.

Let the injunction be dissolved.—I leave both parties to their remedy at law.

Reg. Lib. 1817. A. fo. 353.

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Nov. 24, 25.
Dec. 6.

WILLIAM WILLIAMS, Esquire, PLAINTIFF;

AND

G. T. STEWARD, Esquire, and Others (Commissioners of Taxes, and for the Redemption of the Land-Tax), and GEORGE ISTED, Esquire, DEFENDANTS.

Construction of the Acts for redemption and sale of the land-tax, with reference to the nature of the biddings intended to be made, and contract to be entered into, under the provisions of 42 *G.* 3. c. 116. s. 154.

No express direction, nor any thing to be inferred as to general policy or intention, whether such biddings, subsequent to the first bidding, are to be public or secret, nor as to the particular form.

Commissioners under the act merely ministerial. No remedy against them, therefore, in this Court; but only by, either *mandamus* in the Court of K. B., (as to which doubtful,) or suit in Exchequer, in such cases as are not especially provided for by the Act.

A. having bid 60 *per cent.* above the *first* offer (publicly made according to the directions of the act), and *B.* having subsequently bid one *per cent.* "above the offer of any other person," *quære* if *B.*'s offer be valid and binding as the *highest* offer, within the words and meaning of the act. And it seems that it is so.

But if *B.*'s offer is invalid, *A.*'s is still not "the highest offer" within the meaning of the act. Still less is *B.* to be taken as a trustee for *A.* in such case. And upon these grounds, a bill by *A.* against the commissioners, and against *B.*, to have his contract established, being demurred to by the commissioners, the demurrer was allowed.

THE bill stated that, by an act passed in the 42d year of the King (*a*), intituled, "An Act for consolidating the provisions of the several acts passed for the redemption and sale of the land-tax into one act, and for making further provision for the redemption and sale thereof, and removing doubts respecting the right of persons claiming to vote at elections for knights of the shire, and other members to serve in parliament in respect of messuages, lands, or tenements, the land-tax upon which shall have been redeemed or purchased,"

(*a*) 42 *Geo.* 3. c. 116. amended by 46 *G.* 3. c. 133. 53 *G.* 3. c. 123. 54 *G.* 3. c. 173.

purchased," and by virtue of other acts of parliament made for that purpose, any persons are empowered to purchase or redeem the land-tax charged on any lands in *Great Britain* as fee-farm rents, according to certain modes, and in the manner, and by the means, and according to the several provisions therein, and particularly in the 154th section of the said act mentioned. (*a*) That

(*a*) 42 *Geo.* 3. c. 116. s. 154. The provisions of this long and complicated clause in the act, which are very imperfectly abridged in the marginal note annexed to it in *Pickering*'s edition of the Statutes, are, in substance, as follows:—

" Persons desirous of purchasing the land-tax charged upon any manors, &c. to make out and produce to any two of the commissioners of land-tax in *England*, or commissioners of supply, or chief magistrate, in *Scotland*, acting in and for, or of, the district within which the same shall be situate, a *statement* in writing of the land-tax proposed to be purchased, and of the manor, &c. whereon the same is charged.—The said commissioners, or chief magistrate, thereupon to ascertain the amount of such land-tax, and to grant to the person or persons applying a *certificate* thereof in the form prescribed in schedule (A.) to the act annexed; such *certificate* to contain the description of the manors, &c. and where situate, the names of proprietors, and, where separately assessed, to distinguish the amount of each separate assessment.—The person or persons applying to produce such *certificate* to the commissioners acting in execution of this act by virtue of His Majesty's warrant; and, where the land-tax proposed to be purchased shall not exceed 25*l.*, to give notice in writing to such commissioners whether the consideration is proposed to be in stock or money, and, if in money, whether to be paid at once or by instalments, and when.—The said commissioners under the act authorised and required to examine and *amend* such certificate, if necessary; and thereupon to cause *notice* in writing to be fixed on the *church-door* of the parish or place where the manors, &c. shall be situate, of the offer so made *at least* fourteen days *before any* contract *shall be entered into by them*

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That the defendants, *Steward* and others, were in *March* 1814, and continued to be at the time of filing the

them for the sale thereof.—In case no other offer made within the said *fourteen days*, exceeding the offer so made as aforesaid by at least one per cent., then *it shall be lawful for* the said commissioners *to contract and agree* with the person or persons first offering according to the *directions* of the act.—But, if any other person or persons shall, within the aforesaid period, offer to purchase at a price exceeding the first offer by one per cent. at the least, then *it shall be lawful for* the said commissioners, *and they are required*, to *contract and agree* for the sale to such person or persons who shall, *within such period*, offer *the highest price* for the purchase.—The said commissioners to cause to be inserted, *in every such contract*, the description of the manors, &c., and other particulars thereinbefore directed to be inserted *in such certificates*.—Upon the production of such *contract* at the Bank (in cases where the consideration shall be *stock*,) and upon *the transfer* to the commissioners for the reduction of the national debt, of the stock, or such proportion thereof as shall be agreed to be the first instalment; and (in cases where the consideration shall be *money*) upon production of such *contract* to the receiver-general of the county, &c.; and upon payment to him of such consideration; every such person or persons to be entitled to such *certificates* or *receipts* from the governor and company of the Bank, or from such receiver-general, &c. as by the act before directed in cases of the transfer or payment of the consideration for the redemption of any land-tax. (*a*)—Upon the *registry* of such *contract*, and also of the *certificate* of such commissioners of supply or chief magistrate, in the manner directed by the act, (*b*) the manors, &c., to be wholly freed and exonerated from such land-tax and all further assessments thereof, &c. from the same periods as therein

(*a*) That is, according to the forms prescribed in schedules (E.) and (F.) to the act annexed. See s. 38.

(*b*) Sect. 164.

directed

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the bill, commissioners under the acts aforesaid, and thereby empowered to contract with any persons for the sale and purchase, or redemption of the land-tax, and to execute proper conveyances; and that, in *March* 1814, the defendant *Steward* bid for the land-tax charged on all lands and premises in the borough of *Weymouth* and *Melcombe Regis*, and fourteen days' notice of such bidding was fixed on the church-doors of the respective parishes according to the directions of the statute. That various other offers for the purchase of the said land-tax were made to the commissioners, and, among others, the plaintiff caused an offer or bidding in writing to be made to the commissioners for the same, which offer was charged to be made according to the directions of the act, and was the highest offer or bidding made as aforesaid, and, as such, ought to have been accepted by the commissioners: and was to the following effect:

"List of the houses, lands, &c. in *Melcombe Regis*, "the land-tax of which Mr. *G. T. Steward* has offered "to purchase as fee-farm rents, and on which I make "an additional offer. Should there be any error in "the descriptions or the sums charged, I trust I shall "not be thereby prejudiced; my offer being for the "same premises as Mr. *G. T. Steward*." Then followed a list, containing the names of the proprietors and

directed in cases of *redemption* of land-tax.—The respective purchasers, their heirs, &c. to be entitled to demand and receive, and to be taken as being in the actual seisin and possession of a *fee-farm rent* equal to the amount of the land-tax purchased, to be issuing out of the manors, &c. whereon such land-tax was charged; and to have priority of security on such manors, &c. in respect thereof.—Provided, &c. the sale of such land-tax, not to affect the right of the King to arrears."

occu-

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occupiers, and of the premises charged with the tax, and the sums not exonerated, to which was annexed the offer, as follows: "I do hereby give notice, that I am "desirous of entering into contracts for the purchase of "the land-tax contained in the annexed list, as fee-farm "rents, for each and every of which, separately and "distinctly, I offer to pay to the receiver-general "for the county of *Dorset*, or his deputy, such a sum of "money as shall exceed the price or offer first offered "or made by Mr. *G. T. Steward*, by 60*l. per cent.*, to "be paid by one instalment on or before the 21st "of *April* next, or so soon as the contract may be "completed. *Wm. Williams.*"

That two persons of the name of *Weston* having respectively offered to become purchasers of the land-tax of certain premises in the same parishes, the plaintiff also made distinct offers in writing to purchase the land-tax of these premises at a like advance of 60*l. per cent.* in the same manner as with respect to the offer made by *Steward*; and that on the 7th of *June*, 181 , he received a letter from the secretary to the commissioners, written by their direction, informing him that they had received a higher offer for the purchase of the several sums contained in all the said lists, and had entered into contracts for the sale thereof to the person who made the highest offer for the same.

The bill then stated, that it was alleged by the commissioners, that the defendant *Isted* was the person alluded to in the above letter, and that *Isted*'s offer was an offer of "*one per cent. above the offer of any other* "*person*," without reference to any specific offer, bidding, or sum of money whatever.

The bill also stated certain minutes and resolutions

lutions made by the commissioners, on the 24th of *March*, 1814, at a board for the affairs of taxes, among which was the following:—" That no notice of the " terms offered by any other person, or persons, than " the notice required by the act, of the first offer made, " is required by the act to be given to any of the parties " who have offered a higher price; and that the board " will not communicate, to any of the parties offering " such higher price, the price offered by any other of " the parties."

The bill then proceeded to state a correspondence which passed between the plaintiff and the secretary to the commissioners on their behalf, on the subject of the said offer and purchase, in the course of which the plaintiff protested against the acceptance of *Isted's* offer, and insisted upon his right to the contract; and the commissioners, notwithstanding, rejected the plaintiff's offer, and accepted that of *Isted*, and entered into one or more contract or contracts with him on the footing of such offer; *Isted* insisting that, by virtue thereof, he was well entitled to have the land-tax so contracted for conveyed to him, and to hold the same as fee-farm rents under the act, and the commissioners threatening to convey the same to him accordingly; whereas the plaintiff contended, that an offer, or bidding, to purchase, within the intent and meaning of the act, must, and ought to be, the offer *of a certain sum*, and not an offer, the amount of which cannot be ascertained but by reference to probable offers, which may be made by other persons; that the said offer of *Isted* was irregular and unjust in itself, with respect to the public, and not within the true intent and meaning of the act, and ought to be considered as illegal and void; and that the commissioners, in accepting the same, had acted under a mistake of the true intent and mean-

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ing of the act, and under an erroneous construction thereof.

Upon these grounds, the bill prayed a discovery from the defendants (the commissioners) of all such offers and biddings, and of all letters, &c. relative thereto, in their possession; and that the defendant *Isted* might set forth by what contract, or deed executed, &c., he claimed to hold the land-tax so alleged to be purchased by him, and the date, &c., and might produce the same. And it then proceeded as follows, *viz.* "that, under the "circumstances aforesaid, your orator may be declared "entitled to the benefit of his said offers or biddings so "made to the said defendants (the commissioners) as "aforesaid, for the purchase of the land-tax aforesaid; "and that the said defendants (the commissioners) may "be directed to enter into proper contracts with your "orator, and execute to your orator proper convey- "ances of such land-tax contained in his said offer as "aforesaid, your orator offering to perform the said "offer on his part, according to the directions of the "said recited act of parliament. And that in the mean "time the said defendants (the commissioners) may be "restrained, by the order and injunction of this Court, "from contracting with or conveying in any manner to "the defendant, *George Isted*, or any other person "except your orator, any part of the said land-tax. "And, if it shall appear that the said commissioners "have accepted the said offer or bidding of the de- "fendant *Isted*, and have entered into any contract "with him, or executed to him any deed or instrument "conveying such land-tax, or any part thereof, upon "the ground, or in pursuance of his said offer or bid- "ding, then that it may be declared that the said de- "fendants (the commissioners) have acted under a mis- "take of the meaning, and under an erroneous con

"struction

"struction of the said act of parliament, and that the "said offer or bidding of the defendant *Isted* may be "declared to have been irregular and illegal, and not "valid, under the terms and provisions of the said "act, and ought not to have been acted upon by the "said commissioners, in preference to your orator's "said offer or bidding. And that the said contract or "conveyance to the said *George Isted* may be declared "to have been granted by mistake, and improperly, "and that the same may be set aside, or, if the Court "shall be of opinion that the same cannot be set aside, "then that the said *George Isted* may be declared a "trustee of the land-tax so conveyed to him for your "orator, and may be decreed to convey the same to "your orator, and deliver over to your orator all and "every such deed or conveyance thereof so executed "by the said commissioners, your orator offering to "pay such just and proper charges and expenses as the "Court shall think the said defendant (*Isted*) is en-"titled to have repaid to him in respect of the said "matters; and, in the mean time, that the said defend-"ant (*Isted*) may be restrained (by injunction) from "selling or conveying, &c. to any person except your "orator, and that all the defendants may be decreed "to join in executing all proper contracts and convey-"ances, as may be necessary under the said acts, or "otherwise, for conveying and assuring the said land-"tax to your orator, according to the terms of your "orator's said original offer or bidding, and as this "honourable Court shall direct."

All the defendants appeared to the bill, and the defendants (the commissioners) put in a general demurrer, which was argued before his Honour the Vice Chancellor, on the 21st of *July*, 1815, when his Honour was pleased to allow the same

From

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From the order of the Vice-Chancellor allowing this demurrer, the plaintiff appealed; and the appeal came on now to be heard.

The *Solicitor-General*, and *Bell*, in support of the demurrer, and of the judgment appealed from.

This bill cannot be sustained; *first*, as it is a bill, in nature of a *mandamus*, to compel the commissioners to enter into a contract; and, *secondly*, because, if a contract should be said to have been in fact made, this Court is unable to compel the performance of it; and this, upon two grounds; first, because the commissioners are officers, or agents, of the crown, and, secondly, because, supposing a bill would lie, the Court of Exchequer would be the only Court of competent jurisdiction. Lastly, considering the case on the merits disclosed by the bill itself, there is no equity, inasmuch as the bill states *Isted* to have made a higher offer than that made by the plaintiff.

First, If there is any remedy, it must be by *mandamus*. The bill is not to compel the commissioners to perform a contract already entered into, but to compel them to enter into a contract. If the commissioners have acted corruptly or fraudulently, they may be made amenable by a criminal prosecution, but no civil suit will lie against them.

Secondly, But supposing this to be a bill for the specific performance of a contract, and that the plaintiff was in fact the highest bidder, it becomes a very important question, whether this Court can entertain such a suit against these commissioners, they being officers of the Crown. The ground of the jurisdiction of a Court of Equity, in matters of contract, is, that the plaintiff

can

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can have no adequate remedy at law. But it was formerly considered as the settled practice, that a party must first establish his right at law, in order to entitle him to equitable relief. Thus, it is laid down by Sir *Thomas Clarke*, M. R., as reported by *Ambler* (*a*), that it was the practice, before the time of Lord *Somers*, to send the party to a Court of Law, and, if he should recover in damages, then a Court of Equity would entertain his suit. [See Sel. Ca. Cha. 67. 69.] There are cases, undoubtedly, where the Court will maintain the bill, notwithstanding some formal objection which would preclude the party at law, as the lapse of time, &c. But the true distinction is, that the subject-matter must be such as would enable the party to recover in damages; but where the subject-matter is otherwise, a Court of Equity cannot interfere. So then, in this case, there can be no relief in equity, because an agent of government, making contracts on behalf of the public, is not liable to be sued in respect of those contracts. *Macbeath* v. *Haldimand*(*b*), *Unwin* v. *Wolseley*. (*c*) Nothing also is more clear than that a bill cannot be maintained against a mere agent, without bringing the principal before the Court. Here, the Attorney-General is not a party; and on this ground, also, a demurrer would have held, although we are precluded from relying upon it in the present instance, the demurrer being a general demurrer for want of equity, and not for defect of parties. And yet if, as in the present case, improper parties are made defendants, as agents, and the principal is not before the Court, even though the bill might have been sustainable against the principal, yet a demurrer for want of equity will hold.

(*a*) In the case of *Dodsley* v. *Kinnersley*, Amb. 406.; and see *Harnett* v. *Yeilding*, 2 Scho. & Lef. 549. 553.

(*b*) 1 T. R.

(*c*) 1 T. R. 174. See *Thurgar* v. *Morley*, ante, p. 22.

Thirdly,

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Thirdly, if such a suit can at all be entertained, the Court of Exchequer, and not the Court of Chancery, must be the proper *Forum*. It may be objected, that this would be the ground of a plea, not of a demurrer. But, according to Lord *Redesdale*(*a*), "where it appears "on the face of the bill that some other Court of Equity "has the proper jurisdiction, the defendant may de- "mur to the jurisdiction of the Court of Chancery." That the Exchequer is the only court of competent jurisdiction in matters of revenue is certain. 4 Inst. 112 *Brown* v. *Trant*. (*b*)

But, *lastly*, there is no ground for the allegation that the offer made by *Asted* is inconsistent with the provisions of the statute, or such as the commissioners ought to have rejected. It is not pretended that if the offer had been to give one *per cent.* beyond the offer made by the plaintiff, that would be good, as being sufficiently reduced to certainty: and the offer actually made by the plaintiff, and which he insists upon as the highest valid offer, was precisely of the same nature. Then why is not the present offer equally specific? It is an offer to give one *per cent.* beyond, what?—beyond the highest offer yet made—the offer actually affixed to the church-door. It may be objected that, if another person had made a similar offer, the two offers would have amounted to nothing, and the commissioners could have accepted of neither. So if, at an auction, two persons, at the same time, bid the same sum, the two biddings amount to nothing. But it is enough to say that, in the present instance, no such case has arisen.

(*a*) Mitf. p. 133, 134. (1st Ed.) In note, *ibid*, it is said, the Court of Exchequer, as a Court of Equity, does not seem to give to any person the privilege of being sued there.

(*b*) 2 Vern. 426.

[The

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It was never doubted, in sales of that description, which, in the North of *England*, are denominated candlestick biddings, where the several bidders do not know what the others have offered, that a bidding of one *per cent.* more than any other person has offered, would be binding on the person who makes it.]

For the defendant.

But, besides, here is a contract with third persons, (and those third persons the public,) who are not represented in this Court. Then, if they would make *Isted* a trustee for them, they must adopt all his acts. The ground on which they proceed against him is, that the contract is not valid. Then they must place him in the same situation as if the contract had not been made;—but how can they do this with reference to the public, for whose benefit the contract was made? If there is any power in any Court over the commissioners, as servants of the public, it must reside in the Court of Exchequer, and in that Court only.

When the case was before the Vice-Chancellor, it was compared to *Speer* v. *Crawter* (*a*); where the Lord Chancellor overruled a demurrer to a bill against commissioners under an inclosing act by the lord of the manor adjoining that where the lands to be inclosed were situate; to which suit the lord of the last-mentioned manor, who was also tenant to the plaintiff of his (the plaintiff's) manor, was likewise made a defendant; but that decision does not apply to this case, being grounded expressly on the peculiar relation between the parties; whereas the present case must be considered as if, in

(*a*) 17 Ves. 216.

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that cited, the commissioners only, and not *Taylor* also, had been before the Court.

The relief here prayed is more than this Court can give, and yet is inadequate to the purpose of doing complete justice between the parties interested: and if any Court of Equity can interfere in the matter, it must be one having power to go much further than this Court can do upon any supposition.

Sir *S. Romilly*, *Trower*, and *Phillimore*, for the appellant (the plaintiff.)

First, as to the merits of the case, independently of all objections in point of form. This is a question of very great importance to the public; and the facts must be taken to be, as stated by the bill, and as allowed by the demurrer, without dispute. Now, the offer made by *Isted*, as it is represented by the bill, is an offer of "one *per cent.* above the offer *of any other person*," not expressing whether it is meant to refer only to such offers as had already been made, or to extend to and include all offers which might be made at any subsequent period within the fourteen days. It is now settled, that, if a plaintiff is entitled to any part of the relief prayed by his bill, it is not necessary to shew that he is entitled to all the relief prayed by it. *Isted* had notice of the plaintiff's prior equitable title. He has not joined in the demurrer. So far, therefore, the equity of the bill is not disputed by him, and, till he disputes it, he must be considered as a trustee for the plaintiff. He has, indeed, a right to have the commissioners brought before the Court, in order to ascertain whether *he* has any relief against them—and this is the ground upon which the present bill was filed. But, to proceed to consider the case upon the arguments that have been used in favour of *Isted*'s as a legal offer.

The

The question is, not whether it was a certain offer—whether it might, or might not, be frustrated by another similar offer being made—but whether it is, or is not, according to the provisions of the legislature—whether it is that sort of offer which the legislature requires, according to a true construction of the act referred to. The intention of the act, in prescribing the mode of bidding enjoined by it, was, that every man might have the opportunity of judging what he himself could afford to give, and what other persons were likely to give; and it was thought that, by several persons making their sealed offers, without communication to each other, the public would probably obtain the most that could be gotten. If so, this offer of *Isted* is quite contrary to the spirit and intention of the legislature. It cannot be an offer within the act, which meant to provide for placing all bidders upon an equal footing in making their offers; and, when it is considered how many similar contracts are entered into by officers appointed by and on behalf of the public, it is impossible to be blind to the consequences of such a device being suffered to succeed. The case of a bargain between man and man is very different; yet, in the sales alluded to as commonly practised in the North of *England*, it may very well be questioned, whether such a sort of bidding would not be rejected, as being altogether different from that to which the parties were invited. In this case, the sale contemplated by the legislature was something of a nature quite distinct from a sale by auction, to which, however, it would be converted, were this to prevail. The words of this offer are sufficiently extensive to include all offers to be made hereafter;—but can it be contended that every subsequent offer would in fact be nugatory to the person making it, and only tend to enhance the value of the preceding offer? This would be to destroy all manner of competition.

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tition. If such sealed biddings are to be allowed, it would be for any man to fix upon whatever township or borough he may think proper to purchase, and secure it to himself at an advance of one *per cent.* above the highest bidder, defeating the talents, industry, and calculations of all competitors, or turning them to his own account merely. If the case is at all to be discussed on its merits, surely this reasoning must be conclusive.

The next question is, whether any appeal from the decision of the commissioners can be admitted, except in cases expressly provided for by the act. The office of the commissioners is merely ministerial; and can it be asserted that, because they are commissioners of the Crown, there can be no relief against them in such a case as this, in a Court of Equity?—that, if they have acted in a manner, however gross, corrupt, and fraudulent, there can be no remedy but in a criminal court, which can afford no redress or compensation to the party injured? Suppose their conduct was attended with great loss and injury to the public, could the public have no redress but by fine and imprisonment? It is surely impossible to argue that, in such a case, a Court of Equity could not entertain jurisdiction. It is said, that a bill for specific performance never can be maintained but where an action might be supported for damages. But that is not truly stated. There are many cases in which such a bill would lie, and no action could arise—as where (supposing it a contract between individuals) *A.* contracts with *B.*, and afterwards *B.* contracts with *C.*—no action can be maintained between *A.* and *C.*, but a bill would lie by the one against the other, to carry into execution, or to set aside the subsequent contract. What is imputed to these commissioners is, that they have accepted an offer, which was, in point of fact, not a legal offer.

Another

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Another objection is, that the commissioners, in this case, are acting on behalf of the Crown. But it is not true that they are therefore not liable to be sued. Suppose an estate, vested by act of parliament in trustees for sale—is it necessary that a bill filed against those trustees should bring the *cestui que trusts* before the Court?—and is not this exactly the same case? In this case the legislature has vested the property of the public in certain individuals, for the purpose of sale. Is it not, by analogy, sufficient to bring them alone before the Court to execute their own contracts? This is consonant to every day's experience

On the head of jurisdiction, it has been assumed, both here and before the Vice-Chancellor, (without adducing any authority,) that the Court of Exchequer is the only court of competent jurisdiction No doubt, generally speaking, the Exchequer is the proper court in case of revenue. But where nothing is sought but *equitable* relief, it seems rather difficult to contend that this Court is excluded from giving relief, merely because the Exchequer is the court of revenue. In the case of the prince of *Wales*, now depending in the House of Lords, many records were looked into and examined, and all they were found to prove is, that the Exchequer *has* jurisdiction,—not that no other court has jurisdiction. In *Brown* v. *Trant* (a), which is very shortly stated, it appears that the question was merely of revenue, and nothing is said about equitable jurisdiction. All the possessions of the Crown are, in some sense revenue.

As to what is alleged of a defect of parties, the present question is, whether a case is not made by the bill

(a) 2 Vern. 426.

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against those parties who are already before the Cour. It is *their* demurrer which is to be argued—and that is a demurrer for want of equity, not for defect of parties.

[*The* LORD CHANCELLOR.

This is a perplexing act of parliament—setting out with repealing all former provisions, and substituting for them a mode said to be "hereafter prescribed," and afterwards prescribing none at all. The question is, what is the meaning of the act? Is it that the first offer shall be public, and all the others secret, till the end of the fourteen days?—or that all the successive offers are to be made public by being affixed on the church-door, as well as the first? Again, if the legislature intended publicity to be given to all the offers, but not the same mode of publicity with reference to the subsequent offers as with reference to the first, what mode of publicity did the legislature intend? But the act says nothing about publicity. It directs that all offers are to be sent in *sealed*. Is inspection of the sealed offers to be allowed not till after the expiration of the fourteen days? If so, how am I, in making an offer within the fourteen days, to know the amount of the last bidding? The mode called candlestick bidding admits an offer of so much more than was last bid. I understand the Vice-Chancellor's judgment to have proceeded on the Court having no jurisdiction, regard being had to the powers of the commissioners under the act.]

The *Solicitor-General*, in reply.

To follow the order adopted by the adverse party, in considering the questions which have been made in this case,

First,

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First, Has the act of parliament prescribed any certain mode of making an offer? The only thing prescribed is that the first offer, which is for that purpose to be made public, be the *minimum*, upon which every other person is to be at liberty to make advances to whatever amount they please. It is the imperative duty of the commissioners to take care that the public shall have the advantage of the highest offer. Therefore, whether they are right or wrong in the decision they have come to in the present case, there can be no doubt that they have acted properly in abiding by the highest offer, supposing that there is any question about it. Else, it might have been said on the other side, you have taken upon yourselves a very serious responsibility in rejecting the offer made by *Isted.* They therefore took the opinion of the law-officers of the Crown, and acted according to that opinion. The utmost that can be imputed to them is a mistake of judgment on a question of difficulty. Nor can any blame attach to them in not having communicated to the plaintiff the offers made subsequent to his own. They were themselves to judge of those offers, and ought not to have disclosed more than was strictly necessary to satisfy the plaintiff that his was not the highest offer.

Let us next consider the object of the act of parliament. It directs that the first offer made shall be publicly fixed on the church-door, as the basis of all subsequent offers, but says nothing about the subsequent offers, and is absolutely silent as to the mode in which they are to be made. Whether, therefore, it was intended that they were to be public or private, the plaintiff can have nothing to say on that subject; for his own offer was a private offer. The main argument, however, was, that it is contrary to public policy to receive such an offer as *Isted's*, and that it would defeat the

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object of the act, by which it was intended that every bidder should have the opportunity of forming a deliberate opinion as to value, &c. from the amount of offers already made. But why is this intention imputed to the act? The legislature could never mean to deprive the public of any fair advantage that might be derived from competition. What is there unfair in this mode of competition? The plaintiff bids sixty *per cent.* above the first offer. *Isted*, without knowing the amount of his bidding, allows the question of value to be determined by the offers made, and then says, "I "will give one *per cent.* more than the value, as deter-"mined by the highest offer." It is an object to him of so much importance, that he will give, not the utmost real value, but more than the utmost real value, to acquire it. Why is the public to be deprived of the benefit? The act meant nothing but to procure for the public the greatest possible price that should be offered.

Then comes the second question, whether there has, or has not, been an actual contract? The act of parliament, in words, indeed, states it only as the certificate of a contract: but it is throughout treated in effect, as the contract itself. The commissioners are empowered "to contract and agree with the per-"son offering the highest price." The offer alone does not constitute the contract. Another act is required to give it that effect; and that act is the granting the certificate. The contract, and the certificate of contract, are therefore only different terms used with reference to the same thing,—and that is, the actual contract. Therefore, this is, in effect, a bill to compel the commissioners to enter into a contract, not to perform a contract already entered into. And this (if a sufficient case could be made for it, which the Court is not called upon to decide) would be their duty, which

they might be compelled to execute by a *mandamus*, but not in the present course of proceeding.

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But, thirdly, supposing this were a bill for the performance of a contract already entered into, whether the Court can compel these commissioners, not as trustees—for it is a fallacy so to consider them,—but as agents for the Crown, to perform such a contract? The property which is the subject of it was in the Crown, and never divested out of the Crown till the completion of the contract, if the contract indeed is completed. What is the difference between these commissioners and other mere officers of government? It may safely be laid down as a general proposition, notwithstanding many exceptions, that an agreement, in order to call for a specific performance by the decree of this Court, must be such an agreement as might have been made the subject of an action at law. The case which has been put does not meet it. If *A.* contracts with *B.* and *B.* with *C.*, true, *A.* cannot have an action against *C.*, but he has his action against *B.* The *subject-matter* of the contract is therefore the ground of an action. So far from oversetting, the case so put is absolutely an illustration of the doctrine contended for. Then, since, according to *Macbeath* v *Haldimand*, and the other cases cited, an action could not have been maintained in this case, so neither can a bill be supported.

Then, have these commissioners the power to decide without any appeal? That depends upon the act of parliament, which says nothing of an appeal in such cases as the present, although it makes very peculiar provisions for appeals in certain other cases which are thereby specified. (*a*) Now the very circumstance of

(*a*) See Sect. 190. et seq. to 197.

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an appeal being given in these specified cases marks an intention to exclude it in this, which is not specified. In the present case, no fraud is imputed to the commissioners, but only an error of judgment.

Lastly, that all matters touching the revenue are peculiarly appropriate to the Court of Exchequer, is a principle clearly laid down by the Lord Keeper in the case cited from *Vernon*. And that the present is a case of revenue is evident, for what the bill seeks is to deprive the Crown of the benefit of the excess of *Isted*'s offer above *Williams*'s. This comes directly within the distinction of *Row* v. *Dawson* (a), commented upon by the Master of the Rolls in *Priddy* v. *Rose*. (b) And it was upon the same principle that your Lordship proceeded in a late case where the Commissioners of the Transport Board were made parties. (c)

The LORD CHANCELLOR.

This is a case of great public importance, and which requires considerable attention, in order to come to a right decision. The bill is very skilfully drawn, so as to avoid putting the Court in such a situation as, upon a demurrer being filed, to take matters for granted which are not strictly matters of fact. Thus, as to the contract with *Isted*—after stating only that the commissioners *allege* such a contract to have been made, it charges that the fact is so. So, it represents the plaintiff as being the highest legal bidder; and, if it said no more, the demurrer must be taken as, in point of law, admitting that fact. But then the bill proceeds to state other circumstances raising a question of law, whether the plaintiff's is, in fact, the highest legal bidding?—And thus the admission, which would otherwise follow, is rendered unnecessary.

(a) 1 Ves. 331.

(b) Ante, p. 86.

(c) *Thurgar* v. *Morley*, ante, p. 20.

With

With regard to the act of parliament—as I understand it, the act repeals (so far as it does not expressly save) all the provisions of previous acts. There was formerly an annual act, because the tax itself was only annually granted. While it remained annual, it was vested in, and made payable to, the Crown, and, though called a land-tax, it was primarily chargeable on personal estate, and the deficiency only made raiseable out of land. But when the act passed to render the land-tax perpetual, it became expedient to declare that certain other taxes, which had, up to that period, been perpetual, should be made annual, for the sake of keeping up the security which had been before afforded to public liberty; and then all the provisions of the former annual acts, except so far as they are expressly saved, were repealed.

Now, as to what constitutes the contract under this act, it seems to me, that you must either admit that the highest offer in itself constitutes the contract, or that the grant of the certificate is that which is meant by the term "contract." Now it is to be observed, that the clause of the act referred to (*a*) prescribes two different modes in which the purchase is to be effected, in cases where the amount of land-tax proposed to be purchased does, and does not, exceed 25*l*.

[His Lordship then read, and commented on, the provisions of that section of the act.]

As to the question with reference to the publicity intended, or not intended, to be given to the proceedings here specified, it appears to me that, not only publicity is meant to be given, but the very species of

(*a*) 42 *G*. 3. c. 116. s. 154. See ante, note, p. 473.

publicity

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publicity meant pointed out, in reference to the first offer. And, on the subject of the offer which is to have the preference, what I collect from the whole clause, as to its meaning, is, that the person who, within fourteen days after the first offer affixed to the church-door, shall make the *highest offer*, is the person entitled to call on the commissioners to *contract* with him for the purchase.

Now it is stated in the bill, as a fact, that the first offer, or proposition, was made by *Steward*—notice of which offer (amended, or not, as the commissioners might have judged proper) was duly affixed to the church-door according to the directions of the act. Whether it was fancy, or any particular cause or inducement, which prompted him, it is no matter; but the fact appears to be, that, within the fourteen days prescribed by the act, the plaintiff (*Williams*) caused a communication to be made to the commissioners that he was ready to give 60 *per cent.* more than the amount of *Steward's* proposition for the purchase of the land-tax for which the offer was made. In what manner this communication was made to the commissioners does not appear by the bill, which only *charges* that it was made according to the directions of the act. However, other offers were made for other premises in the same parish; and upon all these offers the plaintiff made a similar proposition to the commissioners of an advance of 60 *per cent.* Then came *Isted's* offer, which (for the present) I must take, as represented by the bill, to have been an offer to give "one *per cent.* above the offer of any other person," however high or low it might be. Now, it is argued that the offer so made by *Isted* does not displace the offer made by the plaintiff, first, because *Isted's* offer mentions no specific sum above which the advance is proposed to be made, and next, because *Isted's* offer was not a public offer. As to the last pro-

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No publicity required by the act to be given to any offer for the purchase of land-tax under the 154th section, after the original offer, notice of which is thereby required to be publicly given in the manner directed.

position, it is very difficult for me to see the grounds upon which it is meant to be contended. The act not only provides publicity, but it describes the very species of publicity to be given to the first offer; and, beyond that, it is silent, containing nothing from which an inference can be drawn as to its meaning with respect to subsequent offers. If the act did (as I cannot find that it does) require the same species of publicity to be given to all subsequent offers, as to the first, the objection which is on this ground made to *Isted*'s offer would equally apply to that made by the plaintiff. If it required publicity, without reference to the particular species of publicity, still it is not stated by the bill that the plaintiff's offer was, in any shape, publicly made, and the same objection would apply for want of its being so stated. It has been argued that publicity of bidding is to be inferred from the necessity of it in order to carry into effect the general intention of the legislature in passing the act. But, although it may perhaps be said that the clause in question would have been better worded if it had contained expressions decisive of the question, it does not appear to me, either that the necessity is so obvious, or that the clause does, in fact, contain any expressions indicative of such a meaning.

Then it is said, this offer of *Isted*'s is not a specific bidding within the intention of the legislature. But I cannot bring my mind to that conclusion. The intention of the legislature was that the highest offer made within the fourteen days should be entitled to the contract; and it is impossible to say that, if 60 *per cent* above the first offer was the highest offer made before *Isted*'s, the offer of one *per cent.* above the highest, is not a still higher offer.

But it is said, the legislature meant that the sale should

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should be so conducted as to give the parties intending to bid the benefit of the judgment and experience of others. If the legislature so meant, the legislature ought to have so provided; and, if it is intended to say that the legislature ought to have provided otherwise than it has provided, that proposition is at least intelligible. But the legislature has not so provided. The mode complained of is not, in point of law, objectionable. To say that it is different from the mode of sale by a public auction is nothing. The act provides different modes of selling in different cases. In some it has actually prescribed the mode of sale by public auction—in others, (as in the present,) not. At present, however, I shall say no more on this part of the subject.

On the other points which have been submitted to the Court, much learning has been displayed in argument, and there is much necessary to be considered. On these points, therefore, I shall say nothing, till I have attentively examined the grounds of the Vice-Chancellor's judgment. On the question of jurisdiction, supposing that the plaintiff could make good his case on the merits, I should be sorry to have it understood that, if this Court is incompetent to compel a discovery, some other Court may not be competent for that purpose. Also, with reference to the question, whether this is a good demurrer of the commissioners alone, considering that the bill is against the commissioners and *Isted* jointly, I wish to defer pronouncing any opinion.

Dec. 6.

The LORD CHANCELLOR.

This case comes before me upon a bill filed by *Williams* against *Steward*, and three others, commissioners under the act of 42 *Geo.* 3. for the redemption and sale of

of the land-tax, and against another person named *Isted*, the prayer of which bill I shall read in the precise words, because I think it difficult to be reconciled with the different provisions of the statute.

[His Lordship here read the prayer of the bill, which see before, p. 478.]

Now I find it very difficult, under the provisions of this act, to declare that *Isted* is no purchaser, and altogether inconsistent with it to declare him a trustee for the plaintiff; and the bill, when it goes on to pray that he may, as such trustee, be decreed to convey to or for the benefit of the plaintiff, is still more at variance with the terms of the act; for, if I understand the act rightly, it appears to me, that, in execution of the powers vested in them by the act, the commissioners have no conveyance to make;* but it is so contrived as, without a conveyance, to vest the property in the purchaser from the moment of the registry and certificate being made, either absolutely, in case of redemption, by exoneration of the premises in his hands from the land-tax with which it stood charged previous to the redemption, or, in case of purchase, by entitling him to demand and receive a fee-farm rent equal in amount to the land-tax purchased. Now, if the plaintiff can make out that *Isted* is a trustee for him, then it undoubtedly follows that *Isted* is bound to make a conveyance to the plaintiff as his *cestui que trust*. But no power to make a conveyance is lodged in the commissioners; and the bill creates this difficulty. It insists that the contract with *Isted* is illegal and void, yet at the same time represents him as a trustee for the plaintiff by virtue of the contract — two propositions, certainly very difficult to be maintained together.

Before I come to consider the provisions of the act, it

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it is necessary to observe, that the land-tax, till redeemed, belongs to the Crown, as charged upon and payable out of lands and hereditaments, only in aid, and to make up the deficiency, of personal property— that is, it so belongs to the Crown, for the benefit of the public. This, then, is a demand against the commissioners under the act, as servants of the Crown, on behalf of the public; and one question is, whether the bill can be supported against them in that capacity; the other being, whether, in respect of *Isted*'s purchase, his was an offer made according to the terms and provisions of the act, so as to be valid and binding upon the commissioners. These two considerations appear to me to embrace all that is now in dispute between the parties.

I have considered the act most attentively, and it is my opinion that no man can say, after a diligent perusal of its enactments, that there do not arise a great many difficulties, in various parts of it, as to its true construction. The act sets out by noticing many former acts, from the 38th to the 41st of the King, inclusive, and expressly repeals all the provisions of those former acts, save in such cases as are thereinafter mentioned; which excepted cases do not extend to any contract, sale, &c. which should be entered into at any time subsequent to the 24th of *June* 1802, but every such subsequent contract, &c. is to be made according to the provisions of the new act. Certain commissioners are then authorised, and various descriptions of persons, bodies politic and corporate, &c. empowered, to contract according to those provisions, the terms of which are afterwards expressed to be contained in certain schedules annexed to the act; and it is very remarkable, on referring to these schedules, that we find in none of them any form of contract whatever, unless the certificate to be granted by the commissioners in the several cases contemplated by the act, is to be

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considered as in itself including such form of contract. I should say rather, that there is only one special case in which the form of contract is *expressed* to be given—and that is in schedule (G) purporting to be a "Form of contract for sale of Crown lands belonging to the Duchy of *Lancaster*." As to all other cases whatever, the contract must be considered as completed, either by the highest bidding, or by the commissioners' certificate declaring that they have contracted. There is also a distinction between the nature of the consideration to be paid for the redemption or purchase of land-tax not amounting to 25*l. per ann.*, and that to be paid where the land-tax exceeds such amount.—In the one case, it is provided that it may be either in stock or in money; in the other case it must be in stock only. (*a*)

No authority in the Court of Chancery to compel the commissioners of land-tax, &c. to grant certificates to persons proposing to purchase, in the form of schedule (A), though it seems a *mandamus* would lie for such purpose.

Now, with regard to the 154th section of the act, the construction of which is undoubtedly attended with many difficulties,—persons desirous of purchasing are thereby directed to produce a statement or schedule of the land-tax proposed to be purchased, and of the lands, &c. whereon charged, to the commissioners of land-tax or supply, &c. who "*shall*, thereupon, ascertain the amount," &c. and who "*shall* grant a certificate thereof in the form of schedule (A)." This, then, I apprehend, the said commissioners, &c. are compellable to do by *mandamus*, although certainly this Court has no authority to compel them. The persons applying are then to produce the certificate so granted to the commissioners under the act, who are "*authorised* and *required*" to examine and amend the same (if necessary), and cause notice in writing to be fixed on the church door, of the *offer*—(and this is the first time that the word "offer" is used) made to purchase such land-tax "at least

(*a*) See Sects. 22, 23, and Sect. 154, ub. sup.

 fourteen

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fourteen days before any *contract* shall be entered into by them for the sale thereof." Here, although the words leave it very much to conjecture as to the form of the *offer* intended, yet they have very accurately laid down in what manner the property, which is the subject of it, shall be described. Certainly it is of necessity that this first offer should be public, or to be made public; for the commissioners are expressly directed to publish it, by causing notice of the offer (which must mean, of the terms of the offer,) to be fixed at the church door, fourteen days, at least, before any contract entered into. But, with respect to a second, third, or any subsequent, offer, I profess I have been unable to find a word of enactment either in what form or manner such offer is to be made, or whether public, or to be made public. If, therefore, those offers are to be kept secret, or if they are to be public, or made public, the reason, in either case, must be to be found in the general spirit and tenor of the act, or in the public policy and propriety of the thing.

Then follows the direction that, if no other offer or offers shall be made, within the fourteen days, exceeding the price first offered by one *per cent.* at least, it shall in such case *be lawful* for the commissioners *to contract* with the person or persons first offering, "according to the directions of the act"—which latter words we can understand in this place, as relative to the offer made, because the manner of making the offer, although not the form of the offer, is specified in the directions preceding—but (it goes on to say) if any other person or persons shall, within the aforesaid period, offer to purchase at a higher price by one *per cent.* above the first offer, it shall, in such case, be lawful to the commissioners, "and they are thereby required," to contract with the person or persons who shall, within such period, offer

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offer the highest price, &c. These words, taken strictly, would imply what certainly cannot be taken to be their meaning judicially; for, literally rendered, they would exclude the person or persons first offering from making any advance upon their first offer so affixed to the church-door as before mentioned; whereas, in a judicial sense, they cannot be considered as intending any thing but that, by the notice being affixed to the church-door, the sale is (to use a vulgar phrase) set a-going, and those who have bid a first time may go on and increase that bidding from time to time, still, however, leaving the manner of making such subsequent offers altogether undefined,—such offers to be made, therefore, (so far as appears from the words of the act) either with, or without, notice of the amount of all preceding offers (except the first); and the commissioners to give the preference to that which they shall ascertain to be really the best offer, made within the period specified.

Then comes the directions about granting the certificate,—the form of certificate,—its production to the cashier of the Bank, or the receiver-general of the place or district, (as the case may be,)—the granting a like certificate by such cashier or receiver upon payment of the purchase-money,—and the registry of contract in the manner directed by the act—(which registry may, I think, be enforced by *mandamus*, although certainly not by any authority of this Court,)—upon which registry the premises are to be either immediately exonerated, in favour of the party redeeming, or charged with a fee-farm rent equal in amount to the land-tax purchased, in favour of the party purchasing,—and that without any other conveyance or form of transfer;—the mode thus prescribed being in itself to operate as an effectual conveyance by authority of the act, and the exoneration being thereby perfected, or the fee-farm rent

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rent vested, as absolutely as could be done by any formal and actual instrument of conveyance or transfer. No form of conveyance is prescribed by the act,—no conveyance whatever can be made under the act but that which the act itself *ipso facto* operates—the parties purchasing or redeeming must do so in one of the modes prescribed by the act, and in no other,—and that mode, and no other, will (as the case may be) absolutely and entirely complete the transaction.

I shall only further allude to the several clauses in the act by which appeals, and other proceedings under the act, are, in some cases, directed to be made in the Court of Exchequer, in others, in that of Chancery; for the purpose of observing that, although the case now before the Court is not one of those to which any of these clauses have reference, yet it would be very long indeed before I could be persuaded to entertain an opinion, that, because only particular cases, and particular modes of appeal in such cases, are pointed out by the act, therefore the legislature has virtually taken away the jurisdiction of other courts of justice in other cases to which these provisions of the act do not apply.

Demurrer to bill for discovery and relief, if good as to the relief, is good as to the discovery also.

I shall now proceed to the contents of the bill, which, in the nature of the relief prayed by it, appears to me, I repeat, to have greatly mistaken the spirit and operation of the act. It is a bill both for discovery and relief; and, if it makes out a case which would entitle the party to discovery only, and not to relief, a demurrer would hold; for, whatever might have been the doctrine on this subject when I first came into the Court of Chancery, it has long been perfectly established, in consequence of Lord *Thurlow*'s decision, that the discovery is only ancillary to the relief, and that, where there is

no

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no right to the relief, that which is only prayed as ancillary to it must partake of the same consequence.

The bill states the act as empowering persons to purchase according to the provisions of the 154th section; the appointment of the defendants as commissioners under the act; in whom, as in a body, the power of contracting is represented as being lodged by the act. The bill then states the offer or bidding made by *Steward*, who (it is true) is one of these commissioners: but it takes no notice of the provision of the legislature (*a*), enabling any two of the commissioners to do any act, &c., which all the commissioners are empowered to do. The consequence, however, of holding that the offer made by *Steward* was not an offer made according to the terms of the act, would be that all offers subsequently made must fall together with it. If the case is really so strong as it is represented to be by those who insist that a person in the situation of a commissioner could not bid, then the whole of the biddings which proceeded upon that first open bidding are bad also. The sale was not properly set a-going in the first instance, and every thing that followed was consequently invalid and void.—Then the bill states that the plaintiff himself made the highest offer "according to the "directions of the act." Now it is certainly true that whatever the bill represents as *fact* must be generally taken to be true by the demurrer; but not what the bill states as inference from matter of law;—as here, it must be taken to be true that the plaintiff considered himself, as he represents himself to be, the highest bidder, "ac-"cording to the directions of the act." But he may have mistaken the directions of the act; and it is for the

A demurrer admits as true what is stated by the bill as matter of fact; not what the plaintiff considers as fact, but which is merely inference from matter of law.

(*a*) 42 *G.* 3. c. 116. s. 8. as to contracts for redemption: but see 53 *G.* 3. c. 123. s. 1., and 54 *G.* 3. c. 173. s. 4.

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the Court to consider what it is that the act has really directed on the subject of biddings, subsequent to the first offer. I again repeat, that I cannot find out what those directions are. I can find nothing in the act but what I have already stated with respect to its provisions; and I must therefore take the plaintiff, in this place, to mean only, that he was the highest bidder, "according to the general spirit and intention of the "legislature in passing the act." Now, if the bill had stopped there, without saying what was the offer subsequently made by *Isted*, I should have been obliged so to consider it: but, when the bill goes on to state the terms of *Isted*'s offer, the question necessarily arises, whether *Isted*'s was, or was not, a legal offer? for if a legal offer, it follows that the plaintiff's was not the highest; and thus the bill contradicts itself. Unless we can shew that *Isted*'s offer was *not* an offer made according to the terms of the act, the bill in fact makes two different cases, which are inconsistent with each other.

Now, upon what has been said, and much that has been ably said, as to the spirit and intention of the act, I do not find any thing that is to my mind very convincing. I can find nothing to support the proposition that the policy of the act requires the proceedings under it to be either public or private. There is nothing to be collected from any part of the act, at least in the terms of it, that such is its policy. The general policy undoubtedly was, to get the highest price for the land-tax intended to be sold or redeemed, for the public advantage. It is said, that a sale under the act is not to be in the nature of an auction, but that it is to be conducted privately, so as to give all persons intending to purchase the full benefit of the judgment of others, and time to consider dispassionately what the real value of the property is. How far these objects may be consistent with each

each other, or with the general policy, it is not for me to determine, because I find nothing with reference to any particular objects of the legislature. All I can say is, that, if it was the intention of the legislature that the public should have the benefit of our respective biddings, I do not see how I could act more for the benefit of the public than by making precisely such an offer as that which *Isted* has made. Here, after the first offer made by *Steward*, the plaintiff comes at once with, what has been properly called, his *fancy price* for the bargain—his offer of 60*l. per cent.* above *Steward*'s offer; and that is followed by *Isted*'s of one *per cent.* above all other offers. Now, if *Isted*'s offer were displaced, still it would not follow that, nor be the same as if it had never been made; nor would the plaintiff, by displacing it, put himself in the situation of purchaser, because he does not thereby become in fact the highest bidder. Another has bid higher than he; and, though his bidding may be set aside as being irregular, the terms of the act are not complied with, the plaintiff's bidding not being thereby made *the highest bidding*. But was *Isted*'s bidding really irregular, as contrary to the provisions of the act? Suppose we admit that it was the intention that subsequent biddings should be secret biddings, might not a person intending to become a purchaser at any time say, the property is worth to him so much more than to any body else, that he will give one *per cent.*, more than any body else for the property? I cannot find any thing in the act upon which I can undertake to say that *Isted* would not be bound by the offer he has made; and, though it is not otherwise necessary for me now to declare it, yet I have stated what is, in fact, my opinion upon this part of the case, in order that it may be known what is that opinion, before the parties go any further.

The questions are, first, Whether the bill can be supported,

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ported, considering it as a bill against the commissioners alone? Secondly, can it be supported by reason of *Isted* being made a defendant together with the commissioners?

As to the first question, there is no estate vested by the act in the commissioners, nor any interest in the property which is the subject of it. They are merely the servants of the Crown for the purposes of the act, nor are they alone able to complete those purposes; for the acts which they are called upon by it to perform are to be followed by other acts, to be performed by others, who are equally servants of the Crown with themselves. They neither have, nor can assume to themselves, any personal responsibility. Therefore, what they may be called upon to do they cannot be called upon to do in this court, by virtue of any authority with which this Court is invested. If the Court of King's Bench would deal with it (which is what I do not venture to affirm) it must be by mandamus; or, if the Court of King's Bench would refuse to interfere, (as I think most probably it would,) then it must be in the Court of Exchequer, that the commissioners are to be so called upon.

As to the second question, upon the best consideration I can give the case, it does not appear to me that the bill is at all the better for *Isted*'s being made a party to it. It represents the contract entered into by *Isted* as altogether invalid. If so, he has unduly obtained the certificate of contract; and, if that has been registered, the registry too is invalid. In short, all his proceedings, from first to last, are invalid. Then the question comes back to this—if not a purchaser for himself, can he be considered as having purchased in trust for the plaintiff? How, or upon what principle, can he be so considered? If his purchase, considered as made

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for himself, is invalid, how can it be valid, if made for another? But if *his* purchase is invalid, still the plaintiff's is not the highest bidding, and he therefore cannot be a purchaser by virtue of that bidding.

Therefore, upon the grounds I have now stated, it appears to me that this demurrer must be allowed.

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Dec. 8.

Specific performance cannot be decreed of an agreement to sell at a price to be fixed by arbitrators (already appointed to settle other matters in dispute between the parties), where the defendant (the vendor) had refused to execute the arbitration-bond, and it was therefore uncertain that any award would ever be made.

THE bill stated that the plaintiff was tenant to the defendant of the premises in question, under a lease, which expired at *Lady-day*, 1815, when, some difficulties having arisen respecting repairs and dilapidations, the same were referred to arbitration, but no award was made, and it was afterwards agreed between them, that the plaintiff should become the purchaser of the premises, and that it should be referred to the same arbitrators to settle the price of the purchase. The agreement was contained in a correspondence, set forth in the bill, and alleged to have taken place between the parties and their respective solicitors; and it was further stated that, in consequence and upon the faith thereof, the plaintiff continued to occupy the premises, and caused the draft of an arbitration bond to be prepared by his solicitors, and sent to the defendant's solicitors for their perusal on behalf of their client; who refused to execute the same, and, in violation of the agreement, had caused a distress to be levied on the premises for rent alleged to be due from the plaintiff as tenant thereof. The bill prayed a specific performance of the agreement, and a reference of title; and, if it should appear that the defendant could make a good title, then that he might be decreed to convey to the plaintiff,

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plaintiff, upon being paid such price as the arbitrators should fix; and for an injunction, in the mean time, to restrain the defendant from all proceedings on the distress, or otherwise, on account of rent alleged to be due.

The defendant by his answer denied the agreement, and insisted on the statute of frauds.

On an application to the *Vice-Chancellor* to dissolve the injunction, which had been obtained on the filing of the bill, the single question which was brought before the Court being, whether the correspondence in the bill stated did or did not amount to an agreement in writing within the statute, his Honour was of opinion that it did constitute such an agreement, and ordered the injunction to be continued accordingly.

The question was now brought before his Lordship by way of appeal from his Honour's judgment.

Leach and *Barber*, in support of the motion to dissolve the injunction, cited *Cooth* v. *Jackson* (*a*), *Milnes* v. *Gery* (*b*), and *Blundell* v. *Brettargh* (*c*), that, where there has been a reference to arbitration, if the award is not made in time and manner stipulated, the Court has in no instance substituted itself for the arbitrators, and made the award. And, in *Milnes* v. *Gery*, a bill for the specific performance of an agreement to sell according to a valuation to be fixed by arbitrators, praying that the Court would appoint a person to make a valuation, or that the valuation might be ascertained in such other manner as the Court should direct, was dismissed.

(*a*) 6 Ves. 34. (*b*) 14 Ves. 400. (*c*) 17 Ves. 232.

Sir

Sir S. *Romilly* and *Wakefield* for the plaintiff.

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The LORD CHANCELLOR.

It has been determined in the cases referred to, that, if one party agrees to sell, and another to purchase, at a price to be settled by arbitrators named by the parties, if no award has been made, the Court cannot decree respecting it. On the other hand, there are cases which determine that, if the parties are agreed as to a valuation, but have not appointed any persons to make the valuation, the Court will itself interfere, so as to ascertain the value, in order to direct a specific performance. But the case now before the Court is different from either; the Court being here called upon, not to ascertain the value, but to decree a specific performance, by the defendant conveying, at such price as certain arbitrators named shall hereafter fix; no arbitration bond having been executed, and it not being certain that any award will ever be made. The strong inclination of my opinion is, that such a bill cannot be maintained, although no direct authority has been produced, either in favour of it, or on the other side. The inconvenience of such a case is such, that I do not see how the Court can in any manner interpose. This view of the case was not presented to his Honour, the *Vice-Chancellor;* and the order pronounced cannot, therefore, be considered as affording any evidence of his opinion on the matter.

The case was not afterwards mentioned to the Court, and the injunction was dissolved accordingly.

Reg. Lib. B. fo. 194.

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Nov. 8.

JOHN THARP, Esq, and Others, - PLAINTIFFS;
AND
JOHN THARP, an Infant, (since of age,) LADY SUSAN DOUGLAS, and Others, DEFENDANTS.

A defendant made a party to a suit only in respect of an annuity to which she is entitled under a will, not allowed to attend at the passing the accounts of the general estate in the Master's office, or to be paid the costs of past attendances, as next of kin to the party beneficially interested in the residue of the estate who had since become lunatic; where there is no direction in the decree for such purpose.

THIS was a petition by Lady *Susan Douglas*, one of the defendants in the cause, that she might be at liberty to attend, by her solicitors, the passing the accounts in the petition mentioned, and all such other accounts as should be brought in before the Master, and might be allowed her costs, already incurred, and to be incurred in respect thereof together with the costs of the present application.

The suit was instituted in 1804, for the purpose of taking the accounts of a great *West India* estate against executors and trustees (also consignees of the property) named in the will of the testator, *John Tharp*, deceased, under which the defendant, *John Tharp*, who was an infant at the time of the suit being instituted, was principally interested, the petitioner (who was his mother) being made a defendant merely as an annuitant under the will. The defendant, *John Tharp*, came of age in *May* 1815. In *June* following, he married Lady *H. C. Hay*. In *January* 1816, he was proved lunatic under a commission; and by an order made in the lunacy (9th *November*, 1816) the plaintiff, *John Tharp*, was appointed committee of the estate, and Lady *H. C. Tharp* (the wife) committee of the person, of the lunatic; the Master being directed to enquire into the state of the lunatic's fortune, with a view to a proper allowance, and due notice of attending the Master thereupon to be given to such person or persons as would be entitled to a distributive share or shares of his fortune in case of intestacy.

There

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There was no issue of the marriage; and the petitioner, representing by her petition a gross case of delay and negligence in passing the accounts in the cause, claimed, (as next of kin of the lunatic, together with her three infant daughters, his sisters of the half-blood,) to be entitled to examine the accounts, and to attend the passing the same in the Master's office. The petitioner further stated that she had accordingly instructed her solicitors to take copies of the accounts and attend at the passing the same, as well as at all other proceedings in the cause respecting the estates in question;—that the petitioner had good reason to believe that their attention and exertions had been very instrumental and efficient in procuring the said accounts to be brought forward and proceeded in, but that considerable costs had been incurred in consequence, and on their (the said solicitors) carrying in their bill of costs on passing the last account of the receiver, an objection was taken before the Master by the solicitors for the defendants (the trustees and consignees of the estate) to the allowance of any costs, and *generally* to the right of the petitioner to attend, she being made a party to the suit only as such annuitant as aforesaid; and the Master had accordingly declined to make such allowance.

Leach and *Bell* in support of the petition.

Sir S. *Romilly*, *Hart*, and *Horne*, contrà.

The LORD CHANCELLOR wished to see the decree made in the cause, and the matter of the petition stood over, to be further looked into accordingly; His Lordship observing that, if the decree did not provide for the petitioner's going in before the Master, he did not see how the Master could permit her to attend at the passing of the accounts in his office, without at the same time intimating (as he was understood to have

done

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done in this case) that it must be at her own costs. That, as to past costs, there was consequently no pretence for allowing them, supposing the decree to be silent on the subject; and, as to making any order allowing her to attend at the passing the accounts in future, he did not see how such an order could be made, without establishing a principle which would let in all annuitants, and persons having an interest in the estate, to an extent which, in many instances, might sweat down the entire property. That, in lunacy, notice is given to the next of kin, and they are allowed to go in, not by virtue of any right under which they can claim to be entitled, in respect of their contingent possibilities, so much as for the protection of the Court, and to assist the Court in watching over the interests of the lunatic. That in a cause, on the contrary, although the old rule that all persons having any charge upon, or interest in, the estate, however numerous, must be made parties, had of late years been dispensed with for purposes of convenience, yet it might often be provident to make a single annuitant a party for the purpose of taking the accounts so far as may be requisite. But it is not therefore necessary to burthen an infant's estate by allowing the attendance of an annuitant at the passing of accounts to which he is a stranger in point of interest. And, it being still insisted that the petitioner should be allowed her costs in respect of past attendances, His Lordship said it did not follow, that, because the Master had permitted those attendances, when he need not have permitted them, the estate must therefore bear the burthen of them.

I do not hear that the subject of the petition was mentioned afterwards.

END OF THE THIRD PART.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

57 Geo. III. 1817.

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Rolls.

June 30.

The ATTORNEY-GENERAL, at the Relation of the RECTOR and SCHOLARS of EXETER COLLEGE, OXFORD, - PLAINTIFFS;

AND

SIR WILLIAM GEARY, Bart., and Others, DEFENDANTS.

By Information and Bill. (a)

Grant to trustees and their heirs, of lands in *Surry* and *Hertford*, in trust, out of the rents and profits, to raise and pay certain annual sums for the benefit of

BY indenture, dated the 25th *June* 1715, between *Hugh Shortridge*, D. D. of the one part, and certain persons therein named, on the other part; it was witnessed, that the said *Hugh Shortridge*, for settling the manors, &c. after mentioned, upon the trusts thereinafter expressed, granted to the several persons, (parties thereto

(a) This case is referred to, ante, p. 425.

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ATTORNEY-GENERAL *v.* GEARY.

thereto of the second part) and their heirs, divers manors, &c. in the counties of *Surry* and *Hertford*, to hold, &c. to the use of the grantor for life, and, after his decease, to the use of the said trustees, their heirs and assigns, upon trust, out of the rents and profits to raise and pay 200*l.* *per annum* as follows; *viz.* to the *Bursars* of *Exeter College*, for the time being, 100*l.* *per annum* for the use of the college for ever, to be applied as therein directed; and the remaining 100*l.* *per annum* to certain persons therein named, for twenty years, to be placed out at interest as received, and be laid out (principal and interest), as there should be opportunity, in the purchase of four advowsons, which should be for the benefit of, and settled on, the *Rector* and *Scholars* of *Exeter College*, and their successors for ever, who should the Rector and Scholars of *Exeter College*, and as to the residue, after taxes, *charges of repairs, &c.* deducted, to be yearly paid to and among the vicars, for the time being, of four several parishes, for the augmentation of their respective livings; they, the said vicars, to collect the rents and account with the trustees, to view the estates, and take care that the same be kept in good repair by the tenants; with a declaration, that it should not be lawful for the trustees, during 40 years, to cut timber, except such as should be wanted for the necessary repairs of mills, &c. and other appurtenances belonging to the estates, and except such young slabs and tillers in the woods in *Hertford*, as should be necessary for selling the underwood; and, after the expiration of the 40 years, then that the trustees should have power to cut as they should think fit, and pay the produce to the said Rector, &c. of *Exeter College*, as a fund for the augmentation of the library.

Held that, by the construction of the deed, the estates were given as one fund for the benefit of two distinct institutions,—the whole to be managed for the benefit of both, in a due course of provident ownership; that the trustees were not restrained, after the expiration of the 40 years, from cutting for the purposes of repairs; nor from cutting timber on one part of the estates for repairs on another part; nor from selling timber when cut, and applying the produce in necessary repairs, so long only as they cut no more timber on the whole property than the repairs on the whole property required; and that the power of cutting young slabs and tillers still continued, with the qualification annexed to it.

hold

hold and enjoy the same according to the usual course of other benefices belonging to the college; and, after the expiration of the twenty years, then to pay the same to the rector of the said college for the time being, for the use of the rector and fellows; and out of the remainder of the rents and profits, to raise and pay 20*l.* *per annum* to certain persons therein named for their lives, and, after the decease of the survivor, to the rector of the said college for the time being, to be applied as therein mentioned: And all the residue of the said rents and profits, "after all taxes, charges of repairs, and other "necessary expenses relating to the said premises, or in "performance of the said trust, were paid and allowed," to be from time to time yearly paid to and among the vicars of *Great Bookham*, *Leatherhead*, *Effingham*, and *Shalford*, for the time being, equally, share and share alike, the better to augment the yearly income of their respective vicarages, subject to the provisoes and appointments thereinafter mentioned; the said vicars alternately to collect and receive the rents and profits, and give receipts, and thereout pay the several sums by the deed appointed, and account for the same with the trustees (who were thereby authorised to call the said vicars to account on *Midsummer-day* yearly). And the said vicars were also yearly, in the alternate course thereby prescribed, to view the premises, and take effectual care that the same were kept in good repair by the tenants; and, if any repairs should be wanting which the tenants should not be obliged to do, then to give to the trustees a full account thereof in writing, that immediate care might be taken for amending and making good the same; the charges of the said vicars in and about the said matters to be allowed them out of the rents and profits. And it was thereby further declared, "that it should not be lawful for the trustees, at any "time during the space of forty years next after the

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"death of the grantor, to fell, cut down, grub, or dig "up any of the timber, or timber-like trees, then grow-"ing, or that during the time aforesaid should grow, on "the premises, or any part thereof; but only such and "so much timber as should be wanted for the necessary "repairing of the mills, farm-houses, and other appur-"tenances belonging to the estates: and also except such "young slabs or tillers of oak growing or to grow in "the woods in the said county of *Hertford*, as should "be necessary, from time to time, for better selling the "underwood thereon, each fall, and no more; but, from "and after the expiration of the said forty years, then "that it should be lawful for the trustees and the sur-"vivor, &c., and they and he should have full power "and authority, from time to time for ever afterwards, "when they should think fit, to fell, cut down, grub up, "sell, and carry away all or any part of the timber "that should be growing on the premises, or any part "thereof; and all such monies that should arise, or that "the said timber should from time to time be sold for, "should, from time to time, and for ever, be paid unto "the said rector and fellows for the time being, to be "by them laid out in buying books to augment the "public library of the college, and to be placed and for "ever kept therein:" with a power for the trustees to lease the estate (except certain woods and underwoods in the parishes of *Digwell*, *Wellwyn*, and *Dartworth*, in the said county of *Hertford*, which should be kept in hand for the better preservation of the timber), for any term of years not exceeding twenty-one years in possession, &c.

In 1720, the grantor died; and, after his death, the trustees entered, and by themselves, and their successors duly appointed, had remained ever since seised of the estates in question.

The

The information, filed against the then trustees, and against the vicars of the four respective parishes named in the deed, prayed a declaration that the trustees for the time being, or the vicars for the time being of the said respective parishes, had not then, nor at any time since the expiration of the forty years, had any right or power, under the trust deed, to cut timber, either for the purpose of repairs, or for sale and application of the money arising from sale to such purpose; or for the repairing, or keeping in repair, any houses, mills, &c., in any other county or parish than that in which the timber actually grew or was produced; or to cut down any slabs or tillers growing in the said woods, except such as (according to the custom of the country, and the true meaning of the trust deed) ought to be so felled or cut down as underwood, and as were absolutely necessary for selling such underwood: and an injunction accordingly.*

It appeared that the trustees, and not the vicars, being considered as having, by the terms of the deed, the power to direct and regulate the cutting of timber, the vicars had accordingly been in the habit of applying to the trustees, from time to time, when timber was wanted for repairs, and of receiving and acting upon their directions.

The cause now coming on to be heard, *Hart*, *Bell*, and *Courtenay*, for the relators, stated the questions to be, First, whether, after the expiration of the forty years from the death of the grantor, it was competent for the trustees to permit any timber to be cut for repairs? Secondly, if it were so, then, whether the supply of timber in aid of repairs was not a tenant-right, confined to the specific land on which the timber was grown? Thirdly, whether the defendants, the trus-

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tees and vicars, or either, had a right under the deed to sell timber, and apply the produce in purchase of other timber for repairs?

In support of the proposition, that after the expiration of the aforesaid period, the College became entitled to all produce arising from the sales of timber, they represented that, by the deed, the expenses of repairs were expressly provided to be paid out of the rents and profits of the estate, other than the timber, the tenants themselves being directed to assume the obligation of repairing; or, at all events, that the deed gave to the trustees, &c. no right, (after the forty years) to cut any more of the timber than was actually wanted from time to time, and was in its kind fit for the repairs of the houses, mills, buildings, and fences, on those parts of the estates on which such timber was grown; that, at any rate, they were accountable for the value of so much of the timber cut on other parts of the estates as was not adapted and actually applied to the purposes of repairs, or as exceeded what was necessary for repairs on those parts of the estates on which such timber was grown respectively; that they had no right to apply any part of the money produced by sales of timber, in any repairs whatever; at all events, not in rebuilding houses, barns, &c., which had been destroyed by fire, and which ought to have been kept insured.

They said that the College was the first and most important object of the testator's bounty—the vicars not being in the situation of mere voluntary objects of such bounty, but being purchasers of the benefits intended them by the deed by the services which it was expected they should render; that all inference of intention should therefore be in favour of the College; but here it was not necessary to supply an intention by inference

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or conjecture, the grantor having sufficiently marked and expressed his meaning; that the power given to the trustees during the forty years was an exception out of the general benefit intended the college, and a suspension during that time of the rights of the college; and that a positive permission to cut during the forty years, so far from affording any inference in favour of its continuance, did, in true construction, operate as a virtual prohibition of cutting for any subsequent period.

Sir S. *Romilly*, *Wetherell*, and *Lomax*, for the defendants, insisted that they were strictly authorised, by the terms of the deed, to cut and sell, from time to time, for the purposes of repairs. That, for this purpose, the whole of the trust estates were to be considered as one estate, and the timber on all parts of the property equally applicable to the repairs of every part of that property; and that a different construction would involve manifest absurdity. The rearing and preserving of a good stock of timber was a main object of the grantor's care; which appeared, as well from the restriction during the forty years, as from his (the grantor's) directions, that the woods, or certain parts of the property should, "for the better preservation of the timber thereon," be for ever kept in hand. But, much as he wished the timber to be preserved, and, even though he had, with that object, forbidden the sale of timber (for the use of the college), during forty years, yet, even during that same period, he permitted the felling of timber for repairs, which shewed that he considered such application of the timber as at all times indispensable. After the expiration of the forty years, he also permitted the sale of timber for the use of the college. This was obviously an enlarging clause, and could not, according to any rules of interpretation, be taken as imposing any restriction on the permission previously

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viously given, to sell for the purpose of repairs. The clauses in the deed, on which the plaintiffs principally relied, had reference as well to the forty years during which the restriction was to operate, as to after times. "Charges of repairs" most clearly, therefore, mean such charges as there might be exclusive of timber.

As to the second point, the grantor had said expressly that, during the forty years, timber grown on the estates in *Hertfordshire*, should be applied in the repair of mills: but it appeared that there were no mills on any of the estates in *Hertfordshire*, whence it followed that he must have intended the produce of one county to be applicable to repairs in another. And then, as to the *third*, if timber on farm *A*. was applicable to repairs on farm *B*. it would involve the greatest inconvenience to hold that the application must be confined to the identical timber; as, suppose a difficulty of carriage between the estates,—suppose none but oak to be grown on the one, and ash or elm the only timber required for the repairs of the other,—could it be said not to be within the intention and spirit of the grant to sell timber on farm *A*. (perhaps, in *Herts*), and purchase that which is wanted for repairs on farm *B*. (in *Surry*), in its vicinity? Always remembering that this is not a question of waste by tenant for life; that the produce of the timber cut is not to be put by the defendants into their pockets; but to be employed, in some shape or other, on the estates, and strictly accounted for.

The MASTER *of the* ROLLS.

These trust estates are given, as one fund, for the benefit of two equally permanent institutions; and the whole ought to be managed for the benefit of both, in such a way as a provident owner would manage his property.

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The grantor, meaning to allow the woods on the property to come to maturity, restrains his trustees from cutting any timber during the space of forty years, except for the purpose of repairs. This is not a special permission to cut for repairs during the forty years: but no restraint is ever imposed on such cutting. When the restriction that was imposed is taken off, it is difficult to contend that, as a consequence of its removal, another restriction that had not been imposed, is to attach. From the affirmative, that, after the forty years, the trustees may cut for sale, how is the negative to be inferred, that they must not cut for repairs? If even during the time that the grantor was most anxious for the preservation of the timber, it might be cut for repairs, it should seem that *à fortiori* might it be so applied after that period had expired. The words, "after charges for repairs," must have had their operation as well during the forty years as afterwards. Now, during the forty years, it is admitted that timber was to be cut for repairs. Therefore, those words must mean other repairs besides those for which timber should be wanted, and can afford no argument for holding that, after the forty years, timber was not to be cut for any kind of repairs.

Then, if the trustees can cut timber for repairs, in what way can they be said to abuse that part of their trust? The propositions of the relators on this part of the case seem to rest on some analogy which it is supposed to bear to other cases, with which it appears to me to have nothing in common. The jealousy lest persons, having particular interests in an estate, may, under pretence of cutting timber for repairs, benefit themselves at the expense of the inheritance, has been the occasion of subjecting them to very strict rules with respect to the manner in which the power is to be exercised.

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cised. But the grantor, who was the absolute owner of these estates, was subject to no such rules. The trustees, who have in them the whole inheritance, are, at law, as little subject to them. On what principle is a Court of Equity to say, that they shall be bound by them? The grantor has not imposed any such restriction. He speaks of the timber growing on the premises —that is, on the estates generally,—as applicable to the repairing of the mills, farm-houses, and other appurtenances belonging to "the estates." If the trustees cut no more timber on the whole property than the repairs on the whole property require, I do not see what ground the relators have to complain. To say that timber growing on one part of the estate should not be employed in making repairs on another part of it, would be perfectly arbitrary. And if the timber be at a great distance from the place where the repairs are wanted, why should the trustees be prohibited from selling the timber, and making the repairs with the produce? This may frequently be an act of provident administration; and no benefit could accrue to the relators from compelling the trustees to transport the identical timber to the spot where the repairs are wanted. The trustees must exercise their discretion fairly, and in such a manner as not to be injurious to the College. But I think they have a discretion in this particular, and are not like tenants for life or years, who are by law tied down to the observance of a precise rule. I cannot, therefore, make the declarations that are prayed for with respect to the timber. (*a*)

As to the young slabs and tillers, I think that, as the power of cutting them still continues, the qualification annexed to it is still in force, *viz.* that no more of them

(*a*) See *Wither* v. *The Dean, &c. of Winchester*, ante, p. 421.

shall

shall be cut than may be necessary for better selling the underwood each fall.

"Declare, That the Trustees for the time being, of "the trust estates in question, or the four vicars for "the time being of the four parishes of *Great Bookham*, "*Leatherhead*, *Effingham*, and *Shalford*, in the county "of *Surry*, have now, and have since the expiration "of the term of forty years from the death of *Hugh* "*Shortridge*, in the pleadings mentioned, had right and "power to fell and cut down timber trees standing or "growing on any part of the said trust estates, for the "purpose of repairing, or keeping in repair, any of "the houses, mills, buildings, or fences, on any part "of the said trust estates, and also for sale, for the "purpose of applying the money arising therefrom, in "the purchase of timber *of the same species or denomi-* "*nation with the timber so sold*, to be applied in repair- "ing, and keeping in repair, any houses, mills, build- "ings, or fences, on the said trust estates, in any other "county or parish than that in which such timber ac- "tually grew or was produced."

Reg. Lib. A. 1816. fo. 2067.

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Dec. 10—17.

The ATTORNEY-GENERAL, at the Relation of W. F. SPICER, Esq. - - PLAINTIFF,

AGAINST

EDWARD CROSS, and the MAYOR, BAILIFFS, and COMMONALTY of the City of EXETER, DEFENDANTS.

Lease of a Charity Estate sought to be set aside: first, as being a lease granted for a long term of years determinable on lives at a small rent, on the payment of a fine; and secondly, on the ground of undervalue: Held not to be disturbed: the Corporation, who were trustees of the Charity, having been always in the habit of letting their estates according to the same mode, it being also supported by the custom of the country in which the estates are situate; and the evidence not bearing out the charge of undervalue.

IN *Michaelmas Term* 1811, an information was filed at the relation of Mr. *Spicer*, against the defendants (the Mayor, Bailiffs, and Commonalty of the City of *Exeter*), for an account of the Charity Estates which were the subject of this cause, and of the rents and profits thereof received by the said defendants, and for carrying into effect the purposes of the charity.

By the decree made at the hearing (22d of *March* 1813), it was, among other things, referred to the Master to enquire what were the estates subject to the charitable uses in the pleadings mentioned, and whether the estates had been properly let; and, if the Master should be of opinion that they had not been properly let, then that he should enquire whether it would be proper to take any, and (if any) what steps to set aside the leases so improperly made.

In pursuance of this decree, the Master made his separate report, dated the 11th of *February* 1815, whereby he found that by indenture of feoffment dated

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the 20th of *August* 1689, duly executed by *Ignatius Jordaine* and *Thomas Crossinge* (two of the aldermen of the city of *Exeter)*, with livery of seisin thereon endorsed, after reciting that *Nicholas Spicer* the elder (late one of the aldermen of the said city), by deed indented, bearing date the 3d of *March* 1609, did grant and enfeoff to them the said *Jordaine* and *Crossinge*, and six others (deceased), their heirs and assigns, the messuages, &c. therein mentioned, to the use of the said *Nicholas Spicer* and *Honor* his wife, and of the heirs of the body of *Nicholas Spicer*, and after their deceases, and for default of such issue, upon confidence and trust, and to and for such employments, payments, and disbursements of the issues and profits of the said premises as thereinafter expressed, that is to say, for the payment of an annual rent charge of 20*l.* to *E. B.* during her life, and for the yearly payment of 20*s.* worth of bread to be distributed to the poor of the city at *Easter*, of 20*s.* towards the repairs of certain parish-churches, of 40*s.* towards the better maintenance of candle-light in the dark nights between the Feasts of *All-Saints* and the *Purification*, to be set up in such convenient places of the said city, as to the mayor and aldermen of the said city should seem meet, and of 6*s.* 8*d.* to the night bellman of the said city, and during the life of the said *E. B.* for the disbursements and loans of the residue of the said issues and profits, to such of the freemen of the said city, as to the said mayor and aldermen, or the most part of them, should be thought most meet and reasonable, by 5*l.* or 10*l.* to each, for 4 years, or under that term, upon good security for the repayment thereof; and, after the decease of *E. B.*, for the disbursements, loans, and payments of the residue of the said issues and profits to such of the freemen, as well merchants as others, as to the said mayor and aldermen, or the most part of them, should seem meet, by 10*l*, or under

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under 21*l.*, for the like term, upon good security for repayment at the end thereof; to the mayor of the said city for the time being, 20*s.*; to the recorder, 10*s.*; to the receiver and stewards, 12*d.* a-piece; to each of the feoffees and of their heirs and assigns that were at the accounts, 12*d.*; to the sword-bearer of the said city, 12*d.*; to the four serjeants, 2*s.* 8*d.*, to be divided among them; to the town-clerk, 10*s.*, for keeping the accounts; and to the chamberlain, 3*s.* 4*d.*, for his travel and pains in and about the seeing and procurement of the execution and performance of the said trust and confidence, and to the procurement of an account yearly, for ever, on the 20th of *December*, to be made of the disbursements. And after further reciting that the said *Nicholas Spicer*, by his will, reciting that he had conveyed the premises to the aforesaid purposes, declared that his said wife should every year during her life, upon *Good Friday*, out of the profits of the same lands, give and deal to so many poor people of *Exeter* as she should see good, the value of 20*s.* worth of bread; and to the poor people of the parish of *Halberton*, the like amount; and that, after the decease of his said wife, his said feoffees, and those to whom they should make any future feoffments as therein mentioned, should perform the same; it was declared that the said *Jordaine* and *Crossinge* (the then only surviving feoffees), did thereby grant, enfeoff, and confirm unto the mayor, bailiffs, and commonalty of the said city, their successors and assigns, all the said premises, upon the uses and trusts in the said indenture and will contained.

The Master by his report further found, that, by an indenture bearing date the 2d of *June* 1772, the defendants the mayor, &c., of *Exeter*, in consideration of 630*l.*, demised to one *Edward Cross* a certain messuage, &c., called *Slow-lake* (comprising the principal part of the

the charity estates), for 99 years, if the said *Edward Cross* (then aged 22), and *Betty* his wife (then aged 29), or either of them, should so long live; to commence immediately after the surrender or other sooner determination of a former lease of 1727, determinable on the life of a person then in existence, at the yearly rent of 20*l.*: and that, by another indenture dated the 24th of *November* 1801, the same defendants, in consideration of 1050*l.*, demised to the said *Edward Cross* the same premises for the term of 99 years, if *John Cross* (then aged 26), and *Sarah Cross* (then aged 16), or either of them, should so long live; to commence on the death of the said *Edward Cross*, or the surrender or other sooner determination of the lease of 1772, at the like yearly rent of 20*l.*

The report then, after stating that similar leases had been from time to time granted, and were then in existence, of other smaller parts of the charity estates, went on to state that the Master found, from certain ancient leases produced before him, that *Nicholas Spicer* the feoffor, in his life-time, granted leases of the charity estates for lives, at small rents; and that since his death, the feoffees of the said estates had from time to time granted leases thereof for lives, at small rents, reserving fines. That, from the affidavits produced before him, the Master found, that the evidence of value of the estates, at the different periods when the leases were granted, was contradictory, inasmuch as the evidence on the part of the relator tended to shew that in *June* 1772, when the first-mentioned lease of *Slow-lake* was granted, the same was of the yearly value of 200*l.*; and in *November* 1801, when the second-mentioned lease of the said farm was granted, the same was of the yearly value of 200*l.*; whereas the evidence on the part of the defendants tended to shew that the yearly value of the said

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said estate was, at the first of the above periods, 60*l.*; and, at the second period, 132*l.* only: and that in the year 1801, *Thomas Gray*, a surveyor, by the direction of the defendants, valued the said estate, and made a calculation of the fine for renewal, which he valued at less than 1050*l.*, the consideration actually paid for the same. That the last-mentioned surveyor had been used to survey and value lands for 50 years and upwards, and was well acquainted with the mode of granting leases on lives in the county of *Devon* (*a*); and that the same method had been constantly adopted by the great land-owners in the said county, and was still continued.

(*a*) The mode of letting in question is mentioned by *Risdon*, in his Survey of Devon, made about the commencement of the 17th century, as the mode then usually in practice throughout the country; and is spoken of by him in terms of great commendation.

A curious instance, as to the prevailing opinion of those days in favour of leases of this description, was mentioned in argument, of the will of Sir *John Maynard*, Serjeant, who gave the manor of *Clyst St. Lawrence*, in the county of *Devon*, to trustees, for the use of *St. John*'s Hospital, in the city of *Exeter*, for the purpose of educating boys in writing and arithmetic, and by which he particularly required, "That the trustees do not forbear, to make any new lease or leases when any of the tenements fall in hand, of purpose to have the mesne profits in their hands, though for the charitable uses, because that would in time tend to the destruction of the tenements and of tillage, and of good husbandry, as it is conceived."

The late editor of *Risdon* (edit. 1811), speaking of the causes which have tended to retard the progress of agricultural improvement in *Devonshire*, says, "Among the principal of these causes, we may probably reckon *the tenures*." He then refers to the passage in his author above alluded to, and adds, "Fortunately, this system of tenure is on the decline, though it has not yet been succeeded by a much better one," &c.

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The Master concluded his report by stating his opinion that the estates, being in trust for charitable uses, had not been properly let; and that the leases thereof ought not to have been granted for long terms at small rents, and upon payment of fines, in such manner as the said leases had been granted; and, more particularly, that it was improper to grant the said reversionary lease of *Slow-lake*; and that it would be proper to proceed against all proper parties for the purpose of setting aside the said lease.

To this report, as to the leases being improper, and the institution of proceedings to set aside the same, an exception was taken, which, in *March* 1815, came on to be heard before his Honour the Vice-Chancellor, a petition having been also presented on the part of the relator to the Master of the Rolls, to confirm the report.

March 1815.

Courtenay and *Merivale* in support of the exception.

Roupell, contrà, contended that the course which the defendants had pursued had been improperly adopted; and that the propriety of the Master's opinion might, and, in this case, would, be more conveniently discussed on the hearing of the petition to confirm the report.

The VICE-CHANCELLOR ordered the exception to stand over till after the hearing of the petition.

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In consequence of this, the exception was abandoned, and a counter-petition presented to the Master

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of the Rolls, which came on to be heard, together with the original petition for confirming the report, on the 11th of *April*.

Sir *Samuel Romilly* and *Roupell* for the Master's report.

Courtenay and *Merivale*, contrà.

April 11, 1815.

The MASTER *of the* ROLLS said, that it is very difficult to lay down any abstract proposition as to the propriety or impropriety of leasing charity estates in the manner here complained of; and that such a mode of letting, generally objectionable, may, under circumstances, be the most beneficial that can be adopted. That, with respect to a charity, indeed, the reason against it is stronger than as to private estates, because the purposes of the charity may be suffered to languish for the want of funds during the intervals between the leases; but that still, even as to charity estates, it is impossible to lay down any general rule. In the present case, the mode of letting the estates in question had commenced before the lease was granted, which it would be the object of the proceedings recommended by the Master to set aside; and, supposing the abstract principle to be established, it would be very difficult to determine, whether, in 1772, a different course could have been beneficially adopted. The predecessors of the then corporation had so let the estates; and the present question was not whether their predecessors had done right in so letting, but whether they (the then corporation) had done right in continuing the practice which they found had been introduced before them; and it is evident that, under the circumstances, to have commenced a different course, might have been to exercise a very disadvantageous option. His Honour also

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also adverted to the general practice of the country, and said, that, as the corporation seemed to have acted for the best, according to what was then the general practice, it would be hard to say that the lease ought to be set aside without further enquiry. But it was nevertheless fitting that the question should be decided; and there was at least so much doubt on the circumstances, as to make it desirable that the course recommended by the Master should be adopted; therefore, without expressing any concurrence with the Master in the opinion he had stated, His Honour thought fit that the report should be confirmed.

Ordered, "That the Master's report be confirmed; "and that the relator should be at liberty to proceed "against all proper parties, for setting aside the two "several leases granted by the defendant, of the cha-"rity estate called *Slow-lake*."

Under this order the present suit was instituted. The bill stated the indenture of feoffment and will of the founder; that the charity estates had ever since been retained by, and in the possession of, the defendants, the mayor, bailiffs, and commonalty of *Exeter*, and their tenants; and that the said defendants were then seised of the legal estate, and had received the rents, &c. for many years, and had made leases and grants from time to time, as suited their own convenience, but the charitable purposes for which the said estates were granted had long fallen into decay and disuse, and the rents, &c. had not been applied for a great many years to those purposes, but had been retained in the hands of the defendants, or applied by

 them

them to other purposes; and, after setting forth a lease of the estate called *Slow-lake*, in the year 1631, for 99 years, determinable on four lives, at the yearly rent of 40*l.*, and a fine of 208*l.*, (which yearly rent was reduced to 20*l.* in the year 1641, in consideration of 270*l.*,) and that in the year 1772 there was only one of the lives existing, upon a lease made in 1727, which was an old life, and would probably soon have fallen, upon which event happening, the defendants (the mayor, &c.) might have been enabled to let the estate at a fair annual rent, according to the actual value, and under proper husbandry covenants; and charging that they ought to have so done in the due execution of their trust; proceeded to state the leases subsequently made, according to the Master's report, charging that the same were improper leases, and were made and granted to, and obtained by, the defendant *Cross* (the then tenant of the estate) for inadequate considerations, and for less than the fair and just value thereof; that the defendants (the mayor, &c.) ought not, as the feoffees and trustees of the charity estates, in the due execution of their trust, to have made a grant or lease thereof for a long term of 99 years, or for lives, reserving a small rent only, and taking a money-gift or fine, instead of requiring and receiving a full and fair annual rent, according to the value of the premises; that the leases were improperly granted as leases in reversion; and that the same were collusively granted to the defendant *Cross*, and were, or ought, in a Court of Equity, to be considered as void leases, and to be set aside, and the lands relet, under the direction of the Court, on a farm lease for a short term of years, reserving the best annual rent for the same, and under proper husbandry covenants. The bill further charged, that the defendant *Cross* was a freeman or member of the corporation, and that he procured the leases from favour, or otherwise, upon some

some undue consideration; that the leases were besides defective, in not containing the usual covenants for good husbandry and repair, and that the farm had been mismanaged, and the buildings thereon neglected, &c.: but these allegations were either denied by the answer, or refuted by the production of the leases, and not insisted upon in argument. The bill prayed that the leases might be declared to be void, or that the same might be set aside, and the indentures of lease delivered up and cancelled; and that the said farm and lands might be relet, in such manner, and upon such terms, as the Court should think proper, for the benefit of the charity; and that all proper directions might be given for the purposes aforesaid, and for the benefit of the charity in respect thereof.

The defendants (the mayor, &c.) by their answer admitted that they were possessed, and considered themselves as being so possessed, of the charity estates, upon the trusts, and for the charitable purposes, contained in the deed of feoffment and will of the founder. They stated that they and their predecessors (members of the corporation for the time being) had, from time to time, ever since they were in possession, applied considerable parts of the rents, &c. to the charitable purposes aforesaid, but admitted that there was, in each and every or several of the years during which the rents, &c. were so applied, some residue or surplus, which they were always ready and willing, upon proper application being made to them, to lay out and apply according to the purposes of the charity; but that, no such application having been made to them, the said surplus had been retained by the defendants, or by certain members of their body appointed by them as trustees, and applied to other purposes distinct from those of the charity. They said that they the said defendants,

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fendants, and their predecessors, had from time to time let the charity estates in such manner as seemed to them likely to be most productive, and that the ordinary and accustomed practice, with respect to letting of lands in the county of *Devon*, had hitherto been to grant leases of 99 years, or other long terms, determinable on three lives, in consideration of fines, and reserving only a small rent, which mode of letting had been usually adopted, not only with respect to houses and buildings, but generally with respect to lands let for the purposes of husbandry only, and, upon the dropping of one or two of the lives named in such leases, it was usual to grant a fresh lease for another long term of years, in reversion, or upon the surrender of the then existing lease; and that such practice or custom must have been in the view of the donor, and approved by him, it appearing from documents then in the custody of the defendants, (and which were produced in evidence,) that he did himself, in or about the year 1598, grant a lease of three lives of part of the said charity estates, upon receipt of a fine, at a rent of 4*s*. *per ann.*, and in the year 1610 a lease for three lives of other parts of the same estate, in consideration of a fine of 60*l*., and a payment of 3*s*. 4*d*. only as a heriot, upon the dropping of the lives; admitting that, such practice or custom prevailing throughout the county, and in the neighbourhood in which the charity estates were situated, such lease as in the bill mentioned was, in the year 1772, made by their predecessors, under the circumstances therein stated. They also admitted the succeeding lease of 1801; denying the circumstances of undervalue, and the charges of collusion and other improper conduct, made by the bill.

The defendant *Cross* went more particularly into the circumstances of value and situation, and alleged

leged that the leases, under which he held, contained all usual covenants, for repair, &c., but not husbandry covenants, such last-mentioned covenants not being usual in leases for lives. He further stated that he had laid out considerable sums in repairs and improvements on the premises, by which the same were then of greater value than they were at the time when the lease of 1801 was granted to him; and he insisted that, in case the leases were set aside, he was entitled to be repaid, not only the sums so laid out and expended by him, but also the several sums paid by him to the mayor, &c., in consideration for the said leases, with interest for the same.

Witnesses were examined on both sides, and a good deal of contradictory evidence produced as to the value of the estate at the respective times of granting the leases of 1772 and 1801, and filing the original information, and the proportion of the several fines paid, and of the rent reserved, to such annual value, the same (according to the witnesses for the plaintiff) being made to amount, in 1772, to 80*l.*; in 1801, to 180*l.*; and in 1814, to 230*l.* (exclusive of outgoings):—while the witnesses for the defendants differed in their opinions as to value, making it from 40*l.* to 65*l.*, at the first; from 106*l.* to 150*l.* at the second; and from 100*l.* to 130*l.* at the third, of the above periods. The only evidence as to the custom of leasing was that of a surveyor, who stated that, within the last fifty years, the usual modes of letting in the county had been as follows: *viz.* 1st, for terms of years not exceeding twenty-one, at rack-rents, either by public auction or private contract; 2dly, by granting leases for ninety-nine years, determinable on the death of the survivor of three lives, in consideration of fines paid, and of small reserved rents and heriots. That, generally, such leases are renewed upon the

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the death of one or more of the lives named, and reversionary leases granted for one or more new life or lives, in consideration of further fines paid, and reserved rents and heriots. That the former mode of letting is adopted when the estates are held by the lord or landowner in demesne, and the latter mode is only generally recurred to in cases where such lands have been heretofore usually so leased. That the mode of calculating the fines to be paid on such last mentioned leases is as follows:—Taking first the gross annual value, then deducting the amount of the land-tax, church rates, poor's rates, reserved rent, and repairs, to ascertain the clear value thereof, and, by charging about seventeen years' purchase of the clear value on a lease for three lives of the purchaser's nomination; and that the number of years' purchase of leases for reversionary interests must, in all cases, depend upon the ages of the life or lives in existence at the time.

The cause now coming on to be heard, Sir *Samuel Romilly*, for the plaintiff and relator, referred to the cases of *Berkhampstead School* (*a*), and of the *Attorney-General* v. *Owen* (*b*), the *Attorney-General* v. *Green* (*c*), &c., and argued that the leases in question were such as this Court would under no circumstances whatever support;—that it must be considered as being now the settled practice to admit no leases of farm lands by the trustees of a charity to be valid, other than customary agricultural leases for 21 years, or shorter periods, and containing all the usual and proper covenants for

(*a*) 2 Ves. & B. 134.

(*b*) 10 Ves. 555. (*c*) 6 Ves. 452. See *Ex parte Griffiths*, 12 Ves. 565. *Attorney-General* v. *Backhouse*, 17 Ves. 283. *Attorney-General* v. *Brook*, 18 Ves. 319. 496. *Attorney-General* v. *Wilson*, 18 Ves. 518. *Attorney-General* v. *Maywood*, 18 Ves. 315.

good

good and husbandlike management; and that this was established with reference to charity estates, upon the evident principle that the purposes of annual distribution cannot be properly accomplished by a mode of letting which brings in occasional supplies of money at distant and uncertain periods.

Bell and *Merivale*, for the defendants the corporation of *Exeter*. *Parker*, for the defendant *Cross*.

Neither the authorities referred to, nor the principles stated, can be held to govern a case like the present, where it does not appear that it was ever in the power of the defendants, as trustees of the charity, to have made other leases of the estates than those which their predecessors had constantly been in the habit of making, and which were sanctioned by the example of the donor. In this respect the case is entirely new; and it has never been laid down, or recognized as the settled practice of the Court, that such a lease of a charity estate is, under all circumstances, absolutely void, and not to be supported. In the case of *Berkhampstead School*, where it was referred to the Master to consider of a proper scheme for letting the estates in future, the Master, by his report, (which was afterwards confirmed), approved of the plan which had previously been acted upon, *viz.* of letting by public auction, for thirty-one years, or lives determinable at that period, partly on fines, partly on rents, specified. (*a*)

No such principle was, therefore, held at that time (1792) to have been established; and where are the decisions by which the law of this Court has since been recognized as now stated? In many cases the admission of such a principle would lead to great and obvious injustice. As, suppose the case of a school, the master

(*a*) See 2 Ves. & B. 136.

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of which is entitled to the profits of the charity estates as a compensation for his services, and that the estates have been usually let according to the mode now complained of, the master for the time being receiving the fines as the lives drop in, in part of his emoluments. Is the existing master to be deprived of this which, though casual, he has contemplated as the means of his remuneration, and thus to be put, without his consent, on a footing different from his predecessors? The purposes of this charity are not of that sort to require a regular distribution to the full annual value of the estates; the reserved rent of *20l.* being fully adequate to all the specified objects of annual distribution, while the ulterior objects which, from the alteration of times and circumstances have been rendered incapable of being performed according to the intention of the donor, might, even if they still existed in full force, be as well supplied by an occasional fund, as by a regular annual income. The answer to the want of covenants for good husbandry is, that they are not usual in leases of this description. They are not usual in prebendal leases and other analogous instances. The true principle is, not that the trustees of charity estates can, under no circumstances, properly lease according to the mode now complained of; but that they are bound to make such leases as a careful and provident owner would be likely to make under circumstances similar to their own. The cases are all of leases for long terms *absolute*, or otherwise at a great under-value; and of under-value in this case there is no evidence, or none which can outweigh the clear and positive testimony of the witnesses on behalf of the defendants, who are surveyors employed by the corporation to value the lands previous to the last lease in 1801, and again in 1814, appearing to be persons well acquainted with the value of lands, as well as with the custom of leasing in that part of the country,

having

having no apparent interest to undervalue them, and proceeding, in calculating the amount of the fines, on principles acknowledged to be correct, or, at all events, not contradicted on the other side.

Sir S. *Romilly* replied.

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The leases, which it is the object of this information to set aside, are impeached on two grounds; first, as being of an improper length; secondly, as having been made for an inadequate consideration.

There is no such principle, as that a lease of a charity estate for lives, or for a long term of years determinable on lives, in existence, is, on the face of it, an abuse of trust.

First, they are leases for three lives; or, what comes to the same thing, for ninety-nine years, determinable on lives; and this, it is said, is of itself sufficient to induce the Court to set them aside. But, to set them aside, it is necessary to assume that the corporation has been guilty of a breach of trust in making, and that the lessee has made himself accessary to that breach of trust in accepting, such leases. Now, though the expediency of letting charity estates in this manner may be more or less questionable, according to the nature of the charity, and the circumstances and situation of the estate, I am not aware of any principle, or authority, on which it can be held, that such a lease is, on the very face of it, an abuse of trust. The legislature has, both in enabling and disabling statutes, considered leases for three lives as on a footing with leases for 21 years absolute. So have many founders of charities, who prohibited the letting on leases for more than three lives or 21 years. It would be a strong thing to say, that, in such a case, a lease for three lives would be void. Supposing, however, that where charity estates had usually been let for 21 years, it would be considered as improper to substitute a letting for lives, it does not follow

A lease for three lives considered both by the legislature in framing enabling and disabling statutes, and by many founders of charities, as on a footing with leases for twenty-one years.

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follow that we can impute abuse to a mere adherence to the ancient and uniform mode of letting, especially when it is a mode usual in the district in which the estates are situated. In laying down prospective rules for the regulation of a charity, it may be very fit to consider which mode is best calculated to answer the particular purposes of such charity. In some cases, it may be expedient to take fines, in others to let at the best annual rent. In the *Attorney-General* v. *Price* (*a*), Lord *Hardwicke* says, "As to letting "the estates for the future, one consideration is, "whether I shall let for the improved rent, or di-"rect fines to be taken;" and he then goes on to declare, that he will leave it to the Master, "to in-"quire, whether letting on an improved rent, or "leasing upon fines, be for the benefit of the charity, "*since a great deal depends upon the custom of the* "*country*." In order to set aside such a lease, already existing, it is not enough to say that the mode of letting is not the best that might be prescribed, because, on such a point, there may be a great difference of opinion among the most experienced: but you must shew, that the mode is *so positively bad*, that no persons, meaning fairly to discharge their trust, would have resorted to it. This may be said of a lease for a long term of years absolute, at a stationary rent; because no man of a reasonable degree of providence would so let his own estate. But many land-owners do still let their estates upon leases for lives; and, formerly, the general usage in *Devonshire* was to let in that manner. As to the charge in the bill, that proper covenants have not been inserted in the lease, I see no evidence in support of it. The assertion, that there is no covenant to repair, turns out to be a mistake. No witness says, that there is any

In order to set aside a lease of a charity estate already existing, it is not enough to say that the mode of letting is not the best that might be described; but it must be shewn to be so positively bad, that no person, meaning to discharge his trust fairly, could have resorted to it. *Ex. gr.* A lease for a long term of years absolute, at a stationary rent.

(*a*) 3 Atk. 110.

any covenant wanting, that is usually inserted in leases for lives.

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As to the second point in this case, *viz.* the allegation that the estates have been let for an insufficient consideration, I have always understood, that leases of charity estates might be set aside on the mere ground of under-value. But it must be an under-value satisfactorily proved, and considerable in amount. It is not enough to shew, that a little more might have been got for the estate, than has been actually reserved. Still less is it sufficient, to infer the under-letting from the value of the property at some subsequent period. In this case, the Corporation of *Exeter* took the precaution of having the lands surveyed and valued by an experienced surveyor, upon whose estimate they set the fine. The imputed motive for partiality to the lessee is negatived. He is not a corporator, nor in any way connected with the corporation. But the witnesses differ as to the amount of the fines, which ought to have been reserved upon the leases made in 1772 and in 1801, respectively. As to the first, the plaintiff's witnesses say that it ought to have been 90*l.* more than it was. But, even if the difference had been more considerable, I should not be disposed to place much reliance upon an estimate made in 1816, of what lands were worth to be let in 1772.

Leases of charity estates may be set aside on the mere ground of under-value: but it must be under-value satisfactorily proved, and considerable in amount.

The difference as to the fine in 1801 is more important. That which was actually paid was, 1050*l.* That which ought to have been paid was, according to one of the plaintiff's witnesses, 1530*l.*; or, according to the others, 1620*l.* The principle of their calculation is, that, regard being had to the ages of the persons whose lives were put into the lease, the fine ought to have amounted to nine years', or, at least, eight and a half years', purchase, on the value of the estate. To this

principle

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Evidence, as to value of witnesses stating opinions formed upon a loose recollection of circumstances at a distant period, not to be put in competition with that of surveyors actually employed at the time to ascertain the value, and where no bad motive can be ascribed; so as to affect a lease, sought to be set aside for undervalue.

principle the defendants do not seem to object. But the controversy is as to the value of the land at the time when the lease was made. This is stated, by the witnesses on the part of the information, to have been 180*l.* *per annum*. And, if that really were its value in 1801, the fine would be less by 570*l.*, or at least by 480*l.*, than it ought to have been. But it does not appear that any one of those witnesses ever had occasion to survey the farm with a view to a correct estimate of its value; but they are, in the year 1816, upon their loose recollection of the several circumstances that enter into the computation of value, to ascertain with precision what the farm was worth to be let in 1801. I cannot put that kind of evidence into any degree of competition with a survey made at the time, for the very purpose of ascertaining what the fine was that ought to be required on a new letting. The surveyor of the corporation could have no motive for undervaluing the land, and so diminishing the fine to be received by his employer. Neither his skill, nor his integrity, is in any way impeached. He valued the farm at 116*l.* The fine was somewhat more than nine years' purchase upon that value.

It seems to me, therefore, to be impossible to say, that it is satisfactorily made out, that the leases have been granted at an under-value. The information must consequently be dismissed, but without costs.

The Order was "That the information do stand "dismissed out of this Court without costs; but the "relator is to be at liberty to apply to the Court in the "cause, the *Attorney-General* against the defendants "the mayor and commonalty of the city of *Exeter*, "as to his costs in this cause, and the defendants, the "mayor, bailiffs, and commonalty of the city of

"*Exeter*,

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"*Exeter*, are to be at liberty to retain their costs, "charges, and expenses, out of the rents and profits of "the charity estates in question in this cause."

Reg. Lib. A. 1817. fo. 441.

LOWTEN, - - - - - Plaintiff,

against

The MAYOR and COMMONALTY of *Colchester*, Defendants.

Dec. 11—15.

Order for sequestration made upon the return to a single *distringas* issued under a decree for payment of costs.

Such an order is only an order *nisi* in the first instance.

Form of *distringas* regular; being to appear and answer contempt merely; (not *ad comparandum et solvendum*,) but the cause for which it issued being specified by indorsement.

Return, "Issues forty shillings," also regular.

AN order was made in this cause (see *ante*, Vol. II. p. 399.) for payment by the defendants to the plaintiff of 796*l*. 13*s*. 8*d*., costs taxed. The defendants had been served with a writ of execution of this order, but did not pay the sum; whereupon the plaintiff sued out a *distringas* against the defendants, which, in the body of it, was only to compel the defendants to appear and answer a contempt alleged to have been committed by them, but an indorsement on the writ specified the particular cause for which it issued. The sheriff returned "Issues, forty shillings."

Sir *A. Piggott*, *Wetherell*, and *Spence*, now moved for a sequestration against the defendants, upon the return of the writ; and they cited (from the register's book) the

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the case of *Harvey* v. *The East India Company* (a), to shew that, where a corporation is in contempt for not obeying

(a) 2 Vern. 595. Note in Raithby's Edition. Hinde. Tit. *Sequestration*, p. 151.

The following is extracted from the register's book.

Harvey v. *The East India Company.* Reg. Lib. A. 1700, fo. 50. b. *Sabb.* 14 *December*.

"Whereas by an order of the 3d instant for the reasons therein contained, it was ordered that a commission of sequestration should issue, directed to certain Commissioners to sequester all the estate real and personal of the defendants the *East India* Company, until they should yield obedience to the decree made in this cause, and the plaintiff be paid his debt, with the costs of the contempt for non-performance of the said decree, unless the said defendants, upon notice thereof to their clerk in Court, should at the next seal shew cause to the contrary, and the defendants' counsel coming to shew cause, &c., whereupon, and upon hearing the writ of execution of the decree, and an affidavit of service thereof, and a letter of attorney executed by the plaintiff, empowering *Thomas Chettle* to demand and receive the money due to the plaintiff, read, and the plaintiff being present in Court, and acknowledging he did execute the said letter of attorney, and upon hearing what could be alleged on the other side, this Court declared, that the plaintiff had proceeded regularly and reasonably, and doth therefore order, that the said order of the 3d be made absolute. But, the defendants' counsel inssiting that a bill of review was prepared in order to reverse the said decree, and praying time to file the same, and that the performance of the decree may be dispensed with until the cause shall be again heard upon the said bill of review, it is thereupon further ordered, that the defendants do pay unto the plaintiff 4000*l.*, and give security to pay unto the plaintiff the sum of 37,917*l.*, decreed to be due to him, deducting the said 4000*l.*, and also 100*l.* already paid to the plaintiff by the said defendants, or such other sum as by any subsequent order shall be adjudged to be paid to the said plaintiff, by the said *East-India* Company, together

obeying a decretal order, a sequestration may be obtained upon the first *distringas*. 1817. LOWTEN v. MAYOR, &c. OF COLCHESTER.

Newland, contrà,

Submitted that the utmost to which the plaintiff could be at present entitled was an order *nisi*; and that only supposing the writ and the sheriff's return to be strictly regular: but he objected to both on the ground of irregularity.

The LORD CHANCELLOR.

The only order to which the parties can be entitled, in the first instance, is an order *nisi*; and that they might have upon motion of course. If there is any irregularity in the form of the proceedings, the defendants may avail themselves of it on shewing cause against making the order absolute.

Dec. 15.

The order *nisi* having been granted accordingly, *Newland*, for the defendants, on this day shewed cause against making the order absolute; and (admitting that, upon the authority of *Harvey* v. *The East India Company*, the plaintiff need not sue out more than one *distringas*, and also that the sheriff's return, which he had before objected to on the ground that, as the whole sum might have been levied under the writ, it should not

ther with interest at 6*l.* *per cent.* from the 13th of *July* last, until the same shall be paid, &c. And therefore all proceedings upon the said order for the sequestration are hereby stayed until further order: but such judgment is to be subject to the order of this Court, and the defendants are to have time till the day after Twelfth-day to file their bill of review."

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not have been confined to the 40*s*., was according to practice,) he now contended that the writ itself was irregular in point of form, it being merely to compel the defendants to appear and answer a contempt (which is the form observed in a *distringas* issuing upon *mesne proecss*); whereas the present writ having issued under a decretal order, the form of the writ ought to be *ad comparandum et solvendum*.

The LORD CHANCELLOR, however, thought that the form of the writ was strictly regular; and the Order for a sequestration was accordingly made absolute. (*a*)

(*a*) Reg. Lib. B. 1817. fo. 79. *Mayor, &c. of Colchester* v. *Lowten; Lowten* v. *Mayor, &c. of Colchester*. *Dec.* 11. 1817.

"Upon opening, &c. it was alleged, that by an order dated the 13th of *March* 1817, it was ordered that the clerk of the Subpœna Office should forthwith issue subpœna for payment by the Mayor, &c. of Colchester to the plaintiffs in the second cause of the sum of 796*l*. 13*s*. 8*d*. for costs, the said plaintiffs by their counsel undertaking that in case they recovered the said sum under that process, they would forthwith pay the costs directed to be paid by the two several orders made in the first cause, dated that day, unless such last-mentioned costs should be first deducted out of the said sum. That in pursuance of the said order a subpœna issued, which was duly served upon the said Mayor, &c.; but the same not being paid, a writ of distringas was issued against the said mayor, &c., directed to the sheriff of *Essex*, to compel them to pay the said sum. That the said sheriff has thereupon made his return, and thereby returned 40*s*. issues only. That, as the said writ directed the said sheriff to seize into his hands the goods and chattels, rents and profits, of the said mayor, &c., the plaintiffs in the said second cause conceive that such should have been his return. It was therefore prayed, That a writ of sequestration may issue, directed to the sheriff of the county

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county of *Essex*, or to certain commissioners to be inserted in the said writ, of the personal estate of the said mayor, &c. and the rents, issues, and profits of their real estates, until the said defendants shall have paid the said sum, or until further order. Whereupon, &c. *Order*, That a commission of sequestration issue, directed to certain commissioners to be therein named, to sequester the personal estate of the said mayor, &c. and the rents, issues, and profits of their real estates, until the said mayor, &c. shall pay the said plaintiffs in the second cause the said sum of 796*l.* 13*s.* 8*d.* costs, or the farther order of this Court," unless cause shewn.

Reg. Lib. B. 1817. fo. 107. (*Dec.* 15. 1817.)

Upon motion to make the former order absolute, *Ordered* accordingly.

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ROLLS. *Dec.* 1—8.

Executor claiming to retain out of the residue certain parts of the property, to protect himself against a future contingent demand in respect of covenants entered into by the testator, for payment of rent and repairs of an estate held by him under lease from a corporation, though there was no existing breach of covenant nor arrears of rent, in respect of which he was liable: on a bill by the residuary legatee for the property so retained, Ordered, that the funds in question be made over to the plaintiff, on his giving a sufficient indemnity to the executor; the terms of such indemnity to be settled before the Master.

BY indenture of lease dated the 23d of *July* 1798, the Mayor and Commonalty of *Canterbury* demised to *Simmons* (one of the aldermen of their corporation), his executors, administrators, &c. for thirty years, at a certain rent, and under covenants for payment of rent and taxes, and for repairs, &c. on nonperformance of all or any of which covenants, it was declared that the lease should be void, and a power of re-entry was reserved.

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Simmons, the lessee, by his will, gave all his real estates, and all his leaseholds and personal estate, to the defendant *Bolland* and another (whom he also appointed his executors), upon trust to sell; and after payment thereout of debts and legacies, to invest the produce in their names upon certain trusts, subject to which he gave the entire residue of his estate to the plaintiff on his attainment of the age of twenty-five years.

The testator died in 1807, leaving the plaintiff his son, then a minor. The trustees and executors proved the will, possessed themselves of the whole of the testator's estate real and personal, and paid the debts and legacies without resorting to a sale of the real estate or of the leaseholds, into the possession of which (including the premises demised by the said indenture of lease) the plaintiff, on his attaining twenty-five, entered; at which time also, the entire residue of the personal estate was transferred to him by the executors, except a bond for 1000*l.* from the Mayor and Commonalty of *Canterbury*, under their common seal, to the testator; and a sum of 800*l.*, 5 per cents, which were still retained by them out of the surplus, and for the recovery of which the present bill was filed.

To this bill the defendant, the surviving trustee and executor, by his answer submitted that he was entitled to retain the property in question, "for the purpose of protecting himself from any claim which might be made against him as devisee in trust and executor of *Simmons* deceased, in respect of rent due or thereafter to accrue due for the premises demised by the said indenture, or of the present or any future breach or non-performance of any of the covenants therein contained; the payment of which rent, and performance of which covenants, the defendant was advised he was liable to under the said indenture;"

indenture;" and had actually then lately received a notice to that effect from the corporation. He at the same time admitted that there were then no subsisting breaches of covenant in respect of which he was so liable, and that no rent was then due or in arrear for the premises; but insisted that, under the circumstances, he was entitled to retain as aforesaid, in respect of any future contingent demands, to which the notice given by the corporation also extended.

Sir *S. Romilly*, and *Wilbraham*, for the plaintiff.

Harrison's case, 5 Co. 28. *b.* "A debt due by bond shall be paid before a statute made to perform covenants, when none of them are, nor perhaps ever will be broken, but are things in contingency and *in futuro;* and therefore such possibility, which peradventure may never happen, shall not bar present and due debts by bond and other specialties." And see *Philips* v. *Echard*, Cro. Jac. 8. 35. that a debt upon record shall be paid before an obligation, and debt upon obligation which is put in suit, before another that is not. In *Hawkins* v. *Day* (*a*), it was decided that the payment by an executor of a simple contract debt, before breach of condition of a bond entered into by his testator, was good, and no *devastavit*, in case of a deficiency of assets; and what substantial distinction can be taken between a simple contract debt and a legacy? If the one be entitled to priority over a future contingent debt, upon what principle is the other to be excluded from the benefit of the same priority? The *dictum* ascribed to Lord *Hardwicke* (*b*), "that all payments of simple contract debts made before breach of the condition are good, but not of legacies," is unsupported by any reasoning, and the point was not before the Court in the case referred to: the question there arising only on an

(*a*) Amb. 160. (*b*) Ib. p. 162.

exception

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exception to the Master's Report disallowing payment of certain sums by the executor on account of their being debts of an inferior degree to the plaintiff's demand. *Wilbraham* also cited and relied upon the case of *Eeles* v. *Lambert*. (*a*)

Cooke and *Combe*, for the defendant.

This is not a bill for a general account, upon which, if a decree were obtained, an inquiry would also be directed as to debts, and the obligees in the bond would be at liberty to come in with the other creditors before the Master. So, when the Court makes a decree in a creditor's suit, all the creditors are considered as being parties to the suit, and the direction for payment out of Court of any part to the parties entitled is made in the regular administration of assets. But this is a suit instituted by the plaintiff, claiming as residuary legatee, in the absence of the creditors whom there are no means of bringing before the Court; and it is a question of great importance, whether a decree made in such a suit would operate as an indemnity to the executor in any action that may hereafter be brought against him by the lessors upon a subsequent breach of covenant. It is clear, that at law it would be no indemnity. In this Court, no legatee has a right to call for the payment of his legacy before all claims upon the estate have been fully satisfied; and this is the distinction between legatees and creditors, which is one of the points in the case referred to. Then, are all claims upon this testator's estate, in the case which is now before the Court, to be considered as having been satisfied? It is perfectly clear that, at law, an executor is personally liable to the lessor of his testator, in respect of rent accrued due

(*a*) It was cited from *Aleyn* (p. 38.), but is also reported by *Styles*, 37. 54. 73., as see *post*. in his Honour's judgment.

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since the death of the testator. "He is charged as "assignee in respect of the perception of the profits; "and it is not material whether he has assets or not. "Therefore he cannot plead *plene administravit;* and, "if judgment be given against him, it is *de bonis pro-* "*priis.*" "If the land be of less value than the rent, "he may plead the special matter, and pray judgment "whether he shall be charged otherwise than in the "*detinet* only;" in which case the judgment is *de bonis testatoris*, and not *de bonis propriis.* (*a*) The case cited by *Wilbraham* does not appear to have been ever decided; nor is it referred to in any subsequent cases, so that it is impossible to state it as an authority. In *Hawkins* v. *Day*, the question of legacies actually did arise, as appears by reference to the register's book (*b*); and the same principle has been acted upon in the case of the Duke of *Queensberry*'s leases, in which the residuary legatees, and some of the particular legatees also, have been kept out of possession for years, by reason of the possible demands which may arise under the covenants which the Duke had entered into for quiet enjoyment.

Sir *S. Romilly*, in reply.

This case is perfectly new: but the novelty of it is in the plaintiff's favour, because it is impossible that the circumstances under which it has arisen have not been of frequent occurrence, although no such claim as that made by the present defendant has ever before been instituted in respect of them. No such claim could have been established under the usual advertisement for creditors to come in and prove their debts in the Mas-

(*a*) 1 Williams's Saunders, 1, note; and the authorities cited.

(*b*) See note at the end of the case.

ter's

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ter's office. The case of the Duke of *Queensberry's* leases is quite different. For those leases had actually been attacked; and there had been a judgment of the Court of Session against them, which judgment is now under appeal. As to the distinction supposed to have been taken in *Hawkins* v. *Day*, how can a legatee be said, as against an executor, not to be as much entitled in respect of his legacy, as a simple contract creditor in respect of his debt? Then it comes to the question, Whether there exists any prior actual demand? Can the executor be permitted to say, I will keep this in my hands for ever, to answer this future possible demand? or during the whole continuance of the lease, which may be of any possible duration? The cases referred to in *Williams's* note on *Saunders* are not applicable; for they only shew that the executor is liable so long as he remains in possession. As soon as he has delivered over the possession to the legatees, his liability ceases, further than to the extent of assets remaining in his hands.

The MASTER *of the* ROLLS.

The equitable relief sought in this case depends upon a legal question, Whether an executor can safely make payment of legacies, or deliver over a residue while there is an outstanding covenant of his testator, which has not yet been, and never may be broken. This question was very much discussed in a case (of *Eeles* v. *Lambert*) reported both by *Styles* and by *Aleyn* (*a*), the ultimate judgment in which is not, however, stated by either. There is also a case of *Nector* and *Sharp* v. *Gennet*, in Cro. Eliz. (*b*), where the same question arose, though in a different shape. A legatee sued in

(*a*) Styles, 37. 54. 73. Aleyn, 38. S. C.

(*b*) Cro. Eliz. 466.

the

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the Ecclesiastical Court for his legacy. The executors pleaded that the testator, who was keeper of a prison, was bound in an obligation to the sheriff (to an amount exceeding the entire value of his property) for the safe keeping of the prisoners committed to his charge; which obligation had become forfeited in consequence of a judgment against the sheriffs on an action for an escape; and the executors had therefore nothing in their hands to answer the demand. This plea was disallowed, whereupon a prohibition was sued, which being demurred to, the defendant prayed a consultation. Upon this the principal question was, Whether the escape was such that the sheriff was suable in respect of it? for, if not, the bond was not forfeited; and, if the bond was not forfeited, then it was said to be plain that the legacy should be first paid; and, to this purpose, it was argued, that by the civil law, the legatary must enter into a bond, to make restitution if the obligation should be afterwards recovered; so there was no inconvenience to any. To which the whole Court agreed, and determined that it was no plea, unless the obligation were forfeited. *Coke* said, "The difference is, when the obligation is "for the payment of a lesser sum at a day to come, it "shall be a good plea against the legatee before the "day, for it is a duty *maintenant*, which is in the con- "dition (as 9 *E.* 4.12.) But otherwise it is, where a sta- "tute or obligation is for the performance of covenants, "or to do a collateral thing. There, until it be forfeited, "it is not any plea against a legatee; for peradventure it "shall never be forfeited, and may lie *in perpetuum*, and so "no will should be performed." The majority of the judges being of opinion that there was no forfeiture, a consultation was awarded, the effect of which, as far as it regards the present question, was to leave the spiritual Court to proceed according to their own established course —namely, to compel the legatee to give security to re-

fund

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fund the legacy, in case of the executors becoming afterwards liable to be sued upon the bond. In the argument of *Eeles* v. *Lambert*, this case is noticed by *Rolle*, Justice; " It was *Nector* and *Sharpe*'s case, 38 *Eliz.* that " legacies ought to be paid conditionally, *viz.* to be re" stored if the covenant should be broken." (*a*)

In *Hawkins* v. *Day* (*b*), Lord *Hardwicke* makes a distinction between simple contract debts and legacies; and seems to entertain a clear opinion that even an unbroken covenant renders it unjustifiable for an executor to pay a legacy. I see no reason to doubt the accuracy of *Ambler*'s report of this case; for his statement is found to correspond with the register's book; and although, in the order overruling the exceptions, particular legacies are specified, yet it appears by a reference which has been made to the Master's report, that they were the only legacies stated to have been paid; and they must have been paid before the forfeiture by breach of the covenants, Lord *Hardwicke* stating the question with respect to them to be, " Whe" ther payment of the assets, before there was any " breach of the condition, ought to be allowed as a " good administration of the effects." (*c*)

In this state of the authorities, it would be too much for me to order the executor to transfer and pay without having security given him in case of judgment being recovered against him at law, for any future breach of the covenant. No decree that I can make will bind the Corporation of *Canterbury*, or protect the executor against their demand, if the bond should hereafter be forfeited. All that I can do, is to order the funds to be

(*a*) Styles 56.
(*b*) Amb. 160.
(*c*) See note annexed.

made

made over on the plaintiff giving a sufficient indemnity; and it must be referred to the Master to settle the terms of such security. (*a*)

(*a*) Reg. Lib. A. 1752. fo. 72.

John Hawkins, Gent. and Others, - Plaintiffs,
against
James Day and *Mary* his Wife, and Others, Defendants.
Wednesday, 17th *January*.

"The matter of the exceptions taken by the plaintiffs and the defendants *Day* and his wife, to the report made in this cause, by Mr. *Holford*, one, &c. dated the 17th day of *June* last, coming on the 16th day of *January* instant, and also on this present day, to be argued before the Right Honourable the Lord, &c. in the presence of counsel learned for the plaintiffs, and for the defendants *Day* and his wife; and upon opening and debate of the plaintiffs' first exception to the said report, and hearing what was alleged by the counsel for the said parties, his Lordship held the said plaintiffs' first exception to the said report to be insufficient, and doth therefore order that the same be overruled; and upon opening and debate of the plaintiffs' second exception to the said report, and hearing the 1st and 2d schedules to the said report read, and what was alleged by the counsel for the said parties, his Lordship held the said plaintiffs' second exception to the said report to be insufficient, and doth therefore order that the same be overruled; and upon opening and debate of the plaintiffs' third exception to the said Master's report, and the said defendants' first exception to the said report, being for that the said Master in and by his said report hath disallowed all the payments reported to have been made by the said defendants in administering the estate of *William French* the testator therein named, which are mentioned in the said third schedule to the said report, amounting together to 3120*l.* 19*s.* on account of their being debts of an inferior degree to the plaintiffs' demand, whereas most of these payments were *bonâ fide* paid by the said defendants many years before any breach

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breach of the security bond in the pleadings mentioned is proved to have been made, and many years before any notice to the said defendants of any such bond being existing; such payments were therefore a due administration of the testator *French*'s estate, and as such were good payments, and ought to have been allowed to the said defendants as good payments, against the plaintiffs' demands; and the said defendants ought not to pay the same over again out of their own proper estate. Upon debate of the matter, and hearing the articles, eight-partite, dated the 28th of *October*, 1715, the articles dated the 16th of *January*, 1718, the Master's report, dated the 29th of *July*, 1747, and the said report, dated the 17th of *June* last, read, and what was alleged by the counsel for the said plaintiffs, his Lordship held the said plaintiffs' third exception to be insufficient, and doth therefore order that the same be overruled. And it is further ordered that the said defendants' first exception to the said report be allowed as to all the sums contained in the third schedule to the said Master's said report, except the two legacies of 15*l.* and 100*l.*, and the sum of 355*l.*, under date of 20th *August*, 1726, the sum of 630*l.*, and the four last items; and as to those sums it is further ordered, that the said exception be overruled; and upon opening and debate of the said defendants' second exception to the said report, and hearing a bond signed *W. French*, dated the 11th day of *December*, 1714, and the answer of the defendants *Day* and his wife, read, and what was alleged by the counsel for the said parties, his Lordship held the said second exception of the said defendants, *Day* and his wife, to be insufficient, and doth therefore order, that the same be overruled. And it is further ordered, that the sum of 5*l.* deposited by the plaintiffs, and the sum of 5*l.* deposited by the said defendants *Day* and his wife, with the register on filing their said exception, be paid back to them respectively, and that it be referred back to the said Master to compute interest on so much as shall be found due on the balance according to the directions aforesaid, pursuant to the order made in this cause, the 21st *December*, 1748."

The following statement of the report excepted to, as stated in the above order, is also

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also extracted from the Register's book.

"The Report of Master *Peter Holford*, dated 17th of *June*, 1752, corrects some mistakes in the report of the then late Master *Holford*, dated 29th *July*, 1747, as to the receipts and payments of the defendants, *Day* and his wife, on account of the personal estate of *William French;* and the amount of such receipts and payments, as corrected, are stated in the first and second schedules to this report, and the balance appears to be 3059*l.* 1*s.* 9*d.* to be paid by the defendants *Day* and wife.—The report then proceeds in the following words.

"And I find that the said late Master *Holford* did by the said former report certify, that the said defendants, *James Day* and his wife, had paid on account of the simple contract debts and legacies of the said *William French*, the several sums in the 9th schedule thereto annexed, amounting in all to 3621*l.* 15*s.* 9*d.*, but had not allowed the same by reason they were not of an equal degree with the debt due from the said *William French*'s estate to the copartnership in question, in this cause, and there being some payments then which were made by the said other executor, and some other payments which ought to have been allowed the said defendant, in the 8th schedule to the said former report. I have in the 3d schedule to this report set forth the particulars of the several sums so paid by the said defendants, on account of such simple contract debts and legacies of the said *William French*, and otherwise as therein mentioned, and instead of the said sum of 3621*l.* 15*s.* 9*d.* the same amount only to the sum of 3120*l.* 19*s.*, which said payments to the amount of 3120*l.* 19*s.* I have thought fit likewise to disallow, on account of their being payments of debts of an inferior degree to the plaintiffs; but in regard it has been insisted upon by the defendants, *Day* and his wife, that many of these payments were made prior to any breach of the security bond in question, which they look upon to be a circumstance very favourable for the allowing such payments, and are desirous the same should appear to the Court, I humbly certify that it has appeared to me that several of the sums of money which make up the said sum of 3120*l.* 19*s.* were

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were paid before any breach is proved to have been made of the condition of the said security bond, notwithstanding which I have thought fit to disallow such payments, in regard it appears to me, that *Ebenezer Burdock* and *Benjamin Lane*, who was the principal obligor in the said bond, were two of the acting executors of the said *William French*, together with the defendant *James Day;* and that the said *Ebenezer Burdock* was one of the copartners in the sugar-house, and one of the obligees in the said bond, and therefore cannot be presumed to be ignorant that there was such bond; and for that reason, there being notice to other acting executors, I apprehend I cannot presume that the defendant *Day* had no notice of the said bond, so as to affect him in the administration of the assets of the said *William French;* and it does not appear to me that the defendant *Day*, upon payment of the several simple contract debts and legacies abovementioned, took any security from the persons to whom the payments were made, to refund the whole or any part of the money paid them, in case it should happen that the said bond should be demanded of the estate, which I apprehend he ought to have done."

The third schedule to this report is styled, "An account of what the defendants, *James Day* and his wife, have paid in discharge of several debts of the said *William French*, by simple contract, and for legacies, and otherwise, which I have not allowed them."

[The several items which are excepted in the above stated order, are in the following terms:]

	£.	s.	d.
Paid to *William French*, his son, by *Mary* his first wife, in discharge of a bond given by the said testator *French*, previous to the marriage with the defendant *Mary Day*, his wife, - -	600	0	0
Paid for one year's interest thereof, - - -	30	0	0
Retained by the said defendant *James Day*, for legacies given to him and his former wife, by the said testator *William French*, - - -	15	0	0
Retained by the defendant *Mary*, his widow, the legacy left her immediately after his death, -	100	0	0

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	£.	s.	d.
Aug. 20. 1726.—Paid Mr. *French's* widow for 5 years and 11 months' maintenance and education of his two children, *Thomas* and *Mary*, during the time of her widowhood, till her marriage with defendant *Day*, 20th *August* 1726, at 30*l*. *per annum* each, - - - - - -	355	0	0

The four last items were:

	£.	s.	d.
June 27. 1741.—Paid *Thomas Fane* his bill of law charges in the High Court of Chancery, *Day* and wife, ats. *Hawkins* and others, - - -	124	0	0
Paid *Walter Morgan* in full, - - - - -	1	19	0
To ship *Raymond*, cost by her as by account, -	50	7	4
To *Noblett Bridgett*, by her as by account, - -	13	11	9

[All the other payments stated in this schedule appear to be in respect of simple contract debts.]

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Dec. 2—18.

BERTIE *v.* THE EARL of ABINGDON and Others.

On a bill by infant tenant in tail, a receiver was appointed, with an order to keep down the interest of incumbrances out of the rents. He kept down accordingly the interest of all but one mortgage, the interest of which (belonging to infants) was never applied for, except a small portion for maintenance, the residue of the rents being paid into Court to the credit of the cause. Tenant in tail, coming of age, suffers a recovery, and re-settles the estate, and afterwards dies. The Master, by his report, having certified that the deceased was not bound, while tenant in tail, to keep down the interest of the incumbrances, and consequently that the rents paid into court, during that time, belonged to his personal representatives; the party claiming to be entitled to the estate under the settlement petitioned for leave to except to the report, on the following grounds. *First*, that in the case of an infant tenant in tail, the interest of incumbrances ought to be kept down out of the rents; 2dly, That the direction to the receiver to keep down the interest, amounted to an appropriation of so much of the rents to that purpose; and, 3dly, That the deceased by not claiming the fund when of age, shewed an intention that it should be so appropriated. But it was held, *first*, that the general question could only arise in favour of a remainder-man or reversioner, and all such rights were in this case barred by the recovery; 2dly, that the order was not meant to vary the rights of the real and personal representatives, but to prevent the incumbrancers from being prejudiced by the Court taking the estate into its custody, and also to protect the estate from hostile proceedings on the part of the creditors; and did not amount to an appropriation; and lastly, that there was nothing in the circumstances to alter the character of the property, which, consisting of rents paid into Court, and neither applied in payment of interest, nor appropriated for such payment, was personal estate, and to be dealt with as such.

THE Honourable *Peregrine Bertie*, by his will, after directing his debts to be paid, and giving several pecuniary legacies and annuities, and after charging his real estates with the payment of so much of his debts, funeral and testamentary expenses, and legacies,

as

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as his personal estate would be insufficient to pay, and with the payment of the said annuities, devised his estates in the county of *Oxford* to *Willoughby* Earl of *Abingdon* for his life, with remainder to the second and other sons of the said Earl successively in tail male, with remainders over.

At the time of making his will, and of his death, the estates in question were subject to two several mortgages, one for 10,000*l.*, and the other for securing the sum of 14,815*l.* borrowed by the testator of the trustees in the marriage settlement of the said Earl of *Abingdon*, to the interest whereof the Earl himself was entitled for life under that settlement.

Upon the death of the testator, the Earl came into possession of the estates by virtue of the devise contained in the will; and in *Hilary* Term 1795, the Honourable *Willoughby Bertie* (who was the Earl's second son) filed his bill, as tenant in tail in remainder under the will, to have the will established, and for an account, praying also that a sum, adequate to the payment of the principal and interest of such debts and legacies as then remained unsatisfied, might be raised by sale or mortgage of the estates, and for a receiver, who should be directed to keep down the interest from time to time out of the rents of the estates, until the principal monies should be discharged.

By an order, dated the 14th of *May* 1797, a receiver was appointed: but before the cause came to a hearing the Earl died, whereupon the plaintiff became entitled as tenant in tail in possession, and the suit was revived against the heir at law and personal representative of the deceased.

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By the decree (10th of *July* 1804) it was declared, that the will be established, and referred to the Master to take an account of the personal estate of the testator *Peregrine Bertie*, and of his debts, funeral expenses, and legacies, and the arrears of the annuities given by his will, and to compute interest in the usual manner, and to distinguish such parts of the arrears of the annuities and interest of the debts as had accrued in the Earl's lifetime and since his death; and in case it should appear that the personal estate was not sufficient to answer and satisfy the debts, funeral expenses, and legacies, and the arrears of annuities, then that the testator's real estates, or a sufficient part thereof, be sold to make up the deficiency; and it was ordered that the receiver (who was also the Earl's personal representative, and a defendant in the cause) should, out of the rents and profits of the estates, pay and keep down the interest of the mortgages and incumbrances and the growing payments of the annuities charged thereon, and pass his accounts before the Master, and pay the balance (after the deductions directed by the former order and by that decree) into the bank, to the credit of the cause.

The interest of the mortgage for 10,000*l.* and the annuities were duly paid by the receiver, and continued to be so in pursuance of the decree: but, with respect to the second mortgage for 14,815*l.*, the Earl being entitled to the interest thereof, as also to the rents and profits of the estates, for his life, such interest had not been paid by the receiver, but the rents and profits of the estates were considered to be a satisfaction of the same during his life, and upon his death his younger children (who were infants) becoming entitled to 10,000*l.* (part thereof,) and his estate to the residue, the rents and profits applicable to the payment of such interest were, from and after that event, paid into Court by the receiver, and from time to time laid out in the purchase

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purchase of stock in the name of the Accountant-General, in trust in the cause.

In 1808, the plaintiff *Willoughby Bertie*, being of age, suffered a recovery, and made a conveyance of the estates (subject and charged as by the testator's will) to trustees, in trust to sell and apply the money arising from sale to such purposes as therein mentioned, and (subject thereto) to stand seised of the estates, or such parts as should remain unsold, in trust for himself (the plaintiff *Willoughby Bertie*) for life, with certain remainders, which did not take effect, and (subject thereto) upon trust for the Hon. *Peregrine Bertie* for life, with remainders over.

The plaintiff, *Willoughby Bertie*, afterwards died; and the said *Peregrine Bertie* becoming entitled, as tenant for life, under this settlement, caused the former suit to be revived, and filed a supplemental bill against the representatives of the said late plaintiff.

By an order (10th of *August*, 1813) it was referred to the Master (among other things) to take an account of the testator's (*Peregrine Bertie*'s) debts and legacies remaining unpaid, and the interest due thereon, and of the arrears of the annuities given by his will, and interest, and of the funds then standing in the name of the Accountant-General in trust in the cause, which were applicable to such payments; and it was ordered that the Master should enquire, and state, whether any part of such funds, and to what amount, belonged to the personal representative of the plaintiff *Willoughby Bertie* deceased, in respect of rents and profits accrued during his life, and which had been paid in to the credit of the cause, and that the sale of the testator's real estates should be staid until the Master should have made his report.

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The Master made his report in pursuance of this order, whereby he found that 7105*l.* 16*s.* 3*d.*, 3 *per cents.*, which was the fund purchased with the rents and profits accrued from the death of the testator, (except such as were then standing to the account of rents and profits,) to *November* 1808, when the late plaintiff *Willoughby* became tenant for life, and the accumulations of such rents and profits, together with the dividends accrued on the said stock, belonged to his (the said late plaintiff's) personal representative. That 1976*l.* 8*s.* 8*d.*, 3 *per cents.*, being the funds purchased with the rents and profits accrued from *November* 1808 to *Michaelmas* 1810, (the quarter day preceding the death of the said late plaintiff,) and the accumulations, &c., were applicable to the payment of interest on the said 10,000*l.* (part of the second of the above-mentioned mortgages); and in case the same should be more than sufficient for that purpose, the residue should belong to the late plaintiff's personal representatives, and that a further sum of 1810*l.* 14*s.* 5*d.*, like stock, (subject to certain deductions,) also belonged to the same personal representative. And under the direction that the Master should enquire whether any and what part of the funds in Court belonged to the personal representative of the deceased plaintiff, in respect of rents and profits accrued in his lifetime, and paid into Court, the Master stated that he was of opinion that such rents and profits as accrued while the said plaintiff was tenant in tail were not applicable to the payment of the interest of incumbrances affecting the estate, notwithstanding the decree of the 11th of *May*, 1813 directed that the receiver should keep down the interest of incumbrances.

A petition was now presented by *Peregrine Bertie*, (the present tenant for life, and plaintiff in the revived suit,)

suit), representing that the claim of the late plaintiff's personal representative, in respect of such rents and profits had not been properly put in issue by the pleadings, and no order made directing the account to be taken in that manner; and that the Master in calculating interest on the 10,000*l.* (part of the said second mortgage), had erroneously charged interest thereon from the 20th of *August* 1790, the day of the testator's death, instead of the 23d of *September* 1799, the day of the death of *Willoughby* Earl of *Abingdon*, up to which it appeared that all interest had been paid; therefore praying that the petitioner might be at liberty to file exceptions to the report upon those grounds, the same having been omitted to be done within the regular time for taking exceptions.

Sir *S. Romilly* and *Phillimore*, in support of the petition.

Heald, for an incumbrancer on the estate, and for other parties entitled in remainder.

Bell and *Tinney*, contrà, for the personal representative of *Willoughby Bertie*, the deceased plaintiff.

In support of the petition it was contended, *first*, that in the case of an infant tenant in tail, the interest of incumbrances ought to be kept down out of the rents and profits of the estates; and, in support of that proposition, they referred to the case of *Sergison* v. *Sealy* (*a*), and *Sanders*'s note: but it was a point which had never been expressly decided. They also mentioned *Chaplin* v. *Chaplin*(*b*), *Amesbury* v. *Brown*(*c*), *Tracy* v. *The Countess of Hereford*. (*d*) *Secondly*, that the order directing

(*a*) 2 Atk. 416.
(*b*) 3 P. Wms. 229.
(*c*) 1 Ves. 477.
(*d*) 2 Bro. 128. And see Lord *Penrhyn* v. *Hughes*, 5 Ves. 99.; *Loftus* v. *Swift*, 2 Sch. & Lef. 642.

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receiver to keep down the interest amounted to an appropriation of so much of the rents and profits to that purpose. *Thirdly*, that the tenant in tail, by not claiming the rents and profits when he came of age, shewed an intention that they should be appropriated to the payment of the interest.

The Master *of the* Rolls.

There can be no question in this case with respect to the obligation on an infant tenant in tail to keep down the interest of incumbrances out of the rents and profits of the estate. For it is only by a reversioner or remainder-man that such an obligation, if it at all exists, can be enforced. Here Mr. *Willoughby Bertie*, the tenant in tail, on coming of age, suffered a recovery, and resettled the estate. There is, therefore, no reversioner or remainder-man to agitate a question as to what ought or ought not to have been done with respect to the incumbrances on that estate.

As to the real and personal representatives of *Willoughby Bertie*, the deceased tenant in tail, they have no equity against each other to vary the state of things as it existed at his death. If the interest of incumbrances has been in fact paid out of the rents and profits, the personal representatives cannot complain of any diminution which the personal estate has sustained by making such payment. If the interest has not been so paid, the person taking the real estate under *Willoughby Bertie*, the deceased tenant in tail, can as little complain that the rents and profits have not been applied in keeping down the interest. He takes subject to all incumbrances. What the incumbrances are is a mere question of fact. Unpaid interest is as much a part of the incumbrance as the principal money. In point of fact, the interest of the mortgage made by *Peregrine Bertie* to the trustees

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under the late Lord *Abingdon's* settlement is unpaid. *Primâ facie*, therefore, it must constitute a charge upon the real estate; and the owner of the real estate has no right to call upon the owner of the personal estate to exonerate him from that charge.

But it is said, that, though the interest be in fact unpaid, the order of the Court, directing the receiver to keep down the interest of the incumbrances, had the effect of an appropriation of the rents and profits to that specific purpose; and that the rights of the parties are, therefore, now the same as if the rents and profits had been so applied. Now, certainly, such a direction is given without the least view to the interests of the real and personal representatives. It is given, partly in justice to the incumbrancers, that they may not be injured by the act of the Court, in taking possession of the rents and profits, to which they had a right to resort for payment of their interest,—partly for the benefit of the estate itself, lest the incumbrancers, having their interest stopped, might be induced to resort to proceedings injurious to those who stand behind them.

The incumbrancers may or may not avail themselves of the order, by applying to the receiver. If they apply to him, they will either be paid their interest, or, if he refuses or neglects to pay them, they may complain to the Court of such neglect or refusal. But if they omit to apply for the interest, it is to be presumed that they are satisfied with the security they have, both for the interest and the principal. The Court does not force payment upon them; nor does it set apart any portion of the rents and profits to answer unclaimed interest. The balance is paid in by the receiver, and carried to the credit of the cause, without any previous enquiry,

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enquiry, whether all the incumbrancers have or have not received their interest. If the estate were not in the possession of the Court, one incumbrancer might claim his interest, and insist on being regularly paid. Another might suffer *his* to run in arrear. The estate would be discharged of the one, and remain burdened with the other. Why should it be otherwise when the estate is in the possession of the Court? To benefit the real, at the expense of the personal estate, is no part of the purpose for which the order is made, although it may be a consequence of the incumbrancer's choosing to take the benefit of the direction given to the receiver.

Here is a fund, consisting of rents and profits, which had not been applied in the payment of interest in the lifetime of *Willoughby Bertie*, nor appropriated for such payment. What is that fund, then, but the personal estate of *Willoughby Bertie?* and what right has the person taking the real estate under him to say, that this portion of the personal estate shall, after his death, be applied to the exoneration of the real estate, from the burden of that interest? I conceive there is no ground for such a claim.

It was thrown out in argument, that *Willoughby Bertie*, by not applying, during the two first years after he came of age, to get this fund out of Court, has shewn that he did not himself consider it as part of the personal estate. But, by merely doing nothing, he surely could not change the actual character of the property. The Court finds it personal estate, and must deal with it as such;—and, being personal estate, it belongs to the personal representative. I am of opinion that the Master's report in this particular is right; and there is, therefore, no reason for allowing an exception to be taken to it.

As

As to that part of the mortgage money to which *Willoughby Bertie* was entitled, the rents and profits that accrued in his lifetime must, to be sure, go in satisfaction of the interest. The personal representative is not claiming both the interest and the rents and profits;—but only rents and profits. When they are paid, the demand for interest will be extinguished.

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Colonel of a regiment having taken a bond of indemnity from his agents, with another as surety, in respect of all charges, &c. to which he may become liable by their default; the agents having afterwards become bankrupt; and government having given notice to the representatives of the Colonel (deceased) of a demand upon the Colonel's estate by virtue of an unliquidated account: a bill by the representatives of the Colonel against the representatives of the surety, to pay the balance due to government, and also to set aside a sufficient sum out of their testator's estate, to answer future contingent demands, though attempted to be supported upon the principle of a bill *quia timet*, dismissed with costs.

No analogy to the case of *Simmons* v. *Bolland*, reported ante, p. 547.

SIR *William Fawcett*, being Colonel of the 15th Regiment of Foot, and subsequently also of the 3d Dragoon Guards, and Governor of the forts of *Tilbury* and *Gravesend*, appointed Messrs. *Ross* and *Ogilvie* his agents, who, as such agents, entered into a bond, by which they became bound to him, jointly with *Duncan Davidson*, as their surety, in the penal sum of 10,000*l.* conditioned from time to time when required, to account with him (Sir *W. F.*,) his executors, &c. in respect of, and pay to him and them, all sums, &c., due from them as such agents, and to settle all public accounts

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accounts which had been, or should, or might be, required, relative to their said concerns as agents, and also to indemnify him (Sir *W. F.*,) his heirs, executors, &c. against all costs, charges, and expenses, which should or might be incurred by the neglect or default of them (Messrs. *Ross* and *Ogilvie*) in the premises, or in any manner relating thereto.

This bond was dated in *August* 1794. In *March* 1804, Sir *W. Fawcett* died. In the beginning of 1805, a commission of bankruptcy was issued against Messrs. *Ross* and *Ogilvie*; and shortly afterwards the following notice was sent from the War Office to the plaintiffs, as representatives of Sir *W. Fawcett*:

"It having been found necessary, in consequence of "the insolvency of Messrs. *Ross* and *Ogilvie*, late agents "of the 3d Dragoon guards, to give orders that the "bills of the regimental and district paymasters, which "had been drawn upon the said agents, for services for "which the necessary funds had been impressed into "their hands, should, in order to prevent the serious "inconvenience that would otherwise have arisen to the "public service, be paid by the paymaster general, I "have the honour to acquaint you, that, under the responsibility of the late Sir *W. Fawcett* for the said agents, "you are liable to make good the same payments. "Which amount you will accordingly be pleased to pay "into the hands of the paymaster general, who has received directions to place the same, when received, "to the account of the 3d regiment of Dragoon guards." Signed by the under-secretary at war.

The amount of the payments, of which notice was thus given, was therein stated to be 3225*l.* 11*s.* 8*d.*

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The plaintiffs took no steps in pursuance of the notice so received by them, being at that time, and until long afterwards, (as stated by their bill,) in ignorance of the bond which had been given. In *November* following they applied, and were admitted, to prove under the commission of Messrs. *Ross* and *Ogilvie* for the amount of the demand so made upon them; and afterwards, in consequence of the advertisement of a dividend to be made on the 4th of *August* 1806, another notice was issued to them from the War Office, intimating that "it would be desirable, and "tend to facilitate the final arrangement of their ac-"counts with the public, if colonels of regiments, and "the representatives of deceased colonels, would grant "to the assignees a special authority, to be approved "on behalf of Government, for carrying into execu-"tion the clearing warrants then granted and not "acted upon, or that should thereafter be granted, for "corps in the agency of *Ross* and *Ogilvie*." A similar proposition was sent to Messrs. *Ross* and *Ogilvie*, and their assignees, and by them transmitted to the plaintiffs in a letter dated the 8th of July 1808, in which they (*Ross* and *Ogilvie*) requested to be permitted to send the plaintiffs the requisite power of attorney: but the plaintiffs finding, on enquiry that no settlement of the bankrupts' accounts with Government had taken place, took no notice of these applications. The plaintiffs, being afterwards about to make a distribution of the funds in their hands, as representatives of the deceased, under a decree of the Court of Chancery, thought proper to apprize Government of such proceeding; and after repeated applications for an answer on the subject of such application, received from the Secretary at War a letter dated the 31st of *January* 1815, as follows:—

"Gentlemen,

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"Gentlemen, I am directed to acknowledge the receipt of your letter of the 29th of *November*, and to enclose herewith a statement of the balance that appears to be due from the representatives of the late Sir *William Fawcett*, on account of the 15th regiment of foot and 3d regiment of Dragoon guards, and to acquaint you that the said balance is more likely to be increased than to be diminished upon the final examination of his accounts.

Regiment.	Period.		Sums due from the public.			Sums due to the Public.		
			£.		d.	£.	s.	d.
15th Regt. of Foot.	From Christmas to Christmas	1778 1783				4768	15	2
	———	1791				1009	4	10
3d Regt. of Dragoon Guards.		1798	365	19	6¼			
		1799	111	2	8½			
		1800				245	3	1¼
		1801				1052	12	9
		1802	273	15	8			
		1803	151	18	7			
			£905	16	1¼	£7075	15	10¼

The bill, after stating the above particulars, went on to state that it was only a short time since the plaintiffs discovered the bond in which *Davidson* was a surety; and that immediately on the discovery thereof, they served the defendant (the personal representative of *Davidson*) with a copy, together with a copy of the foregoing statement of the account claimed by Government; and that having been so called on for payment of the sum of 3225*l.* 11*s.* 8*d.*, and having afterwards found the increased sum of 6169*l.* 19*s.* 9*d.* to be due to Government in respect to public money issued on account of the said regiments, and that there would probably be a much larger balance found ultimately to be due to Government on such account, and Messrs. *Ross* and *Ogilvie* having become bankrupts, and the said *Duncan*

Davidson

Davidson being bound to indemnify Sir *William Fawcett* against all such deficiencies, they had applied to the defendant accordingly to pay and discharge the balance already found due to government, and (in order to enable them to make a just distribution of their testator's estate under the decree) to set apart a sufficient sum out of the estate of the said *Duncan Davidson*, to indemnify them in the event of a further sum being found due on a final adjustment, which was prayed accordingly.

The defendant, by his answer to this bill, said he believed that upon the balance of accounts with *Ross* and *Ogilvie*, as army agents, in respect of the several regiments for which they acted, a large sum would be found due to *Ross* and *Ogilvie*; and that any balance which might be found due from them in respect of the 15th regiment of Foot would be set off against such general balance. He alleged, that if at the time when the proposition made by government to the effect above mentioned was transmitted to them, the plaintiffs had furnished the power of attorney which was required, *Ross* and *Ogilvie* would have been able, and were ready, to procure the settlement of all the accounts in which they were concerned as Sir *William Fawcett*'s agents. He submitted that the plaintiffs had no claim against him by virtue of the bond, inasmuch as they had not, nor had their testator, suffered any loss, or been in any way damnified in respect of the accounts of *Ross* and *Ogilvie* as agents, and as he believed it was not probable that they ever would be so damnified; and that if they had any right to call upon the defendant in respect of the same (but which he did not admit), they should have enforced their claim in a Court of Law, and could have no relief in Equity. The defendant further stated (and his answer was supported by evidence

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to the same effect,) that the ordinary course pursued in settling the accounts of army agents by the paymaster-general is to treat them as one general account, and to set off sums which were due to the agent in respect of one regiment against monies which might be due from the same agent in respect of other regiments; and also that it was not usual, or according to the ordinary practice of government, in cases where they had been in the habit of settling accounts with any person as agent from time to time for any particular regiment, to call upon the colonel of that regiment for payment of any deficiency that might appear upon the said account, if there was money due to such agent in respect of other regiments sufficient to cover such deficiency.

It was also in evidence on the part of the defendant, that the usual course of settling such accounts is with the agent, and not with the colonel;—that they are settled under powers of attorney from the colonel, or his representatives, and cannot well be settled without them;—that many colonels of regiments in the agency of *Ross* and *Ogilvie* had, since their bankruptcy, given powers of attorney to their assignees, under which the accounts of their regiments had been closed; and probably if the plaintiffs had given such power, the accounts of the regiment in question would have been closed in like manner; and also, that although the accounts of *Ross* and *Ogilvie* with government had not been finally settled up to the end of 1783, yet a general statement had been made by them, and delivered to the War Office, to the end of that year, including the over-issue on account of Sir *William Fawcett*'s regiment, the balance of which was in favour of *Ross* and *Ogilvie* to the amount of 40,000*l.*; and one of the clerks at the War Office had frequently admitted that a very considerable balance, although

although not to the same amount, was still owing to them on the accounts for that period.

Sir S. *Romilly* and *Roupell*, for the plaintiffs,

Alleged that the bill was in the nature of a bill *quia timet*, and upon that principle to be supported, as in the case where Lord Keeper *North* held, that if *A.* is bound for *B.*, and has a counter-bond from *B.*, and the money is become payable on the original bond, equity will compel *B.* to pay the debt, although *A.* is not troubled or molested for the debt, since it is unreasonable that a man should always have such a cloud hung over (*a*) him. The terms of the bond, in this case, are such as entitle us, not only to call for payment of what is actually now claimed by government, but to be indemnified to the extent of the penalty against future payments.

Wetherell and *Heald*, contrà.

This is only a claim made by the Secretary at War, not in respect of a settled account,—no debt actually due. The object is to compel the representatives of Mr. *Davidson*, as surety for Messrs. *Ross* and *Ogilvie*, to impound, by way of anticipation of a future possible demand, which the plaintiffs, as representatives of Sir *W. Fawcett*, may be compelled to answer. It is impossible to produce any case in which the Court has, by way of anticipation, called upon a surety to make good the engagements of his principal, before the person en-

(*a*) Earl of *Ranelagh* v. *Hayes*, 1 Vern. 190. 1 Eq. Ab. 79. pl. 5. This was only a case put by the Lord Keeper by way of analogy to the case before him, which was that of a bill by the Earl of *Ranelagh* for the specific performance of a covenant to keep harmless in respect of an assignment of shares of the Excise in *Ireland*, upon which he was sued by the Crown.

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titled to indemnity has in effect been damnified. If such were the legal effect of the bond, the plaintiffs ought to go to law for their remedy, and can have no relief in a Court of Equity. But if not, there is no equitable ground upon which they are entitled to have that relief here which a court of law would refuse them.

Sir S. *Romilly*, in reply.

This is not the case of principal against surety, but of surety seeking to compel payment by the principal debtor. Sir *W. Fawcett* was answerable to government for his agents; but the agents themselves were the principal debtors; and thus the case comes within the principle upon which His Honour decided that of *Wright* v. *Morley* (a), which was, that as the creditor was entitled to the benefit of all the securities the principal debtor had given to his surety, the surety had full as good an equity to the benefit of all the securities the principal gave to the creditor; that the surety had precisely the same right that the creditor had, and was to stand in his place,—therefore determining that the surety was not only entitled, with regard to the payments actually made, to stand in the place of the creditor, aud be reimbursed out of the fund assigned for the payment; but had also an equity to have the fund applied in his exoneration, that fund being provided by the principal debtor for the purpose of securing the payment. And it was accordingly decreed, according to the prayer of the bill, that the plaintiff should be reimbursed what he had paid out of the fund in question; and that a sufficient portion should be set apart to answer the accruing payments. So in *Mosely*,

(a) 11 Ves. 12. 22. referring to *Parsons* v. *Briddock*, 2 Vern. 608. And see *Glossop* v. *Harrison*, Coop. 61. 318.

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318. (*a*), Sir *Joseph Jekyll*, Master of the Rolls, is represented to have said,—"If I borrow money on mortgage of my estate for another, I may come into equity (*as every surety may against his principal*) to have my estate disencumbered by him." It is nothing to say that such a bill as the present may have been seldom filed, or that no instance can be produced of such a decree as is prayed by it, if it can be shewn, by analogy to decided cases, that it is according to principles upon which the Court usually acts, and which are completely established. The case of *Simmons* v. *Bolland* (*b*), decided here a few nights ago, was, in principle, much stronger than this. There, no covenants were broken: but the executor claimed and was allowed to retain, out of the residuary fund, sufficient to protect him against the consequences of any future possible breach of covenants. So, in the case of the Duke of *Queensberry*'s leases. That cited from *Aleyn* (*c*), is also in point with the present. But, in *Simmons* v. *Bolland* it was most improbable that any demand could ever arise in respect of the covenants of which it was sought to guard against the effects of a future possible breach. Here a demand has been made already; and it is in the ordinary course of government transactions that such demands are established after a much longer lapse of time than in the present case. We had an instance, only a few nights ago, of such a demand, in respect of transactions which had taken place during the seven years' war. (*d*) In this case, it should be referred to the Master to ascertain what sum it will be proper

(*a*) *Lee* v. *Rook*, Mos. 318.

(*b*) Ante, p. 547.

(*c*) *Eeles* v. *Lambert*, Aleyn, 38. Styles, 37. 54. 73.

(*d*) In a case of *Kilby* v. *M'Adam*, the circumstances of which I am not acquainted with, and understand that it ended in a compromise.

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proper to set apart to answer the demands to which the plaintiffs may eventually become liable on account of the agency of *Ross* and *Ogilvie*.

The MASTER *of the* ROLLS.

The first point to be considered is, in what relation the parties to this bond stood to each other at the time of its execution.

Government allowing the colonel of a regiment to appoint his own agent, the colonel is answerable for such agent, not by virtue of any security which he gives to government, but by operation of law.

Government allows the colonel of a regiment to appoint his own agent. The colonel is answerable for such agent, not by virtue of any security which he gives to government, but because the law throws that responsibility on the principal. Large sums of public money pass directly into the hands of these agents, and accounts are kept and settled with them by government, subject, however, to the ultimate liability of the colonel, by whom they have been appointed. The colonel, however, takes security from his agent to indemnify himself against the consequences of such liability.

In the case of an ordinary money bond, there is no distinction, upon the face of it, between principal and surety. *Secùs*, in the case of an indemnity bond, where the surety expressly stipulates for the act of his principal.

In the case of an ordinary money bond, there is no distinction upon the face of it, between the principal and the surety: but it is otherwise in the case of a bond of indemnity. In the present instance, Mr. *Davidson* stipulates for no act of his own: he had no money to receive, no account to settle; but as surety for Messrs. *Ross* and *Ogilvie*, he engages that they shall duly account, and that he will indemnify Sir *William Fawcett* against the consequences of their neglect or default. In doing this Mr. *Davidson* incurred a definite legal obligation. Then the first question that arises is, why should the plaintiffs come into a court of equity to enforce a mere legal obligation? They say, because, as the representatives of Sir *William Fawcett*, they stand in the

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A surety may, in equity, compel his principal to relieve him of his liability by payment of the debt.

the situation of a surety, and, as a surety, are entitled in equity to a relief which they cannot obtain at law. It is true that a surety may come here to compel the principal to relieve him of his liability, by paying off the debt. But Sir *William Fawcett*'s representatives and *Davidson* do not stand in the relation of principal and surety in the sense in which the rule of equity considers that relation. Whatever loss there may be, it is true, will ultimately fall on *Davidson*, and therefore in a certain sense *Davidson* may be legally considered the principal debtor: but in equity he is no more the proper debtor than Sir *William Fawcett*. Both are answerable for *Ross* and *Ogilvie*; and though *Davidson* is bound to keep Sir *William Fawcett* indemnified, that obligation does not arise out of any principle of equity, but is created by special convention between the parties. Except for the bond, *Davidson* would have nothing to do with the debts of *Ross* and *Ogilvie*. The bond, therefore, which alone created, must determine the extent of, his liability. There is no principle, upon which a court of equity can extend the legal effect of the bond. Its legal effect is to protect against the consequences of future deficiencies, but not to entitle the party to call for anticipated and precautionary payment, by way of preventing the risk of his being hereafter damnified. I say this upon the supposition that a debt had been actually established as due to the public: but of this there is no evidence, beyond the mere assertion of the Under-Secretary at War, and that made not by way of claim upon *Ross* and *Ogilvie*, but merely in answer to the application of Sir *William Fawcett*'s representatives to ascertain what that claim might probably amount to from the then state of the accounts. The 3225*l.* 11*s.* 8*d.*, stated to be the amount of payments for which Sir *William* had become responsible, in the first letter from the War Office, soon after the bankruptcy

of

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of *Ross* and *Ogilvie*, was not claimed by government in respect of a debt actually due from *Ross* and *Ogilvie*, but in respect of unpaid bills, which had been taken up, and for which the paymaster-general had become answerable. The application was therefore made to the representatives of Sir *William Fawcett* to replace those securities, without regard to the balance which might ultimately be found to be due to the agents upon a general account with government; and, from its subsequent silence, it must be taken that government had suffered them to pass into that general account.

The account transmitted to Sir *William*'s representatives in 1815 contained the whole demand which government then supposed itself to have upon Sir *William*'s estate, accompanied with a statement that the balance was more likely to be increased than diminished. There is no evidence that any sum of money in particular was at that time actually due from *Ross* and *Ogilvie* to government. The *dicta* in the cases cited (*a*) furnish no authority for the demand made in this instance; for they presume that, even where a proper surety comes into equity to compel payment of a debt by the proper principal, he is able to tell what that debt is. Can a surety say to his principal, "Bring money into Court "by way of deposit, because it may eventually turn out "that a debt may be found to be due by you for which "I may become answerable?"

What is here asked, is to have a new security, and one of a totally different sort from that which *Davidson* consented to give,—a security by deposit of money, instead of a security by personal obligation.

(*a*) Of Lord Keeper *North* in *Ranelagh* v. *Hayes*, 1 Vern. 190.; and of Sir *Joseph Jekyll* in *Lee* v. *Rook*, Mos. 318.

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There is no alaogy in this case to the provision which the Court sometimes makes for an unascertained debt, as, for instance, where it refuses to direct a distribution of the estate among residuary legatees, if apprised that there are existing claims to which the executors may eventually become liable, in respect of covenants which their testator has entered into. (*a*) The Court is not administering Mr. *Davidson*'s estate. It is not called upon to distribute the residue, while it is uncertain whether a claim may not be made on the executor in consequence of this bond. The executor is not seeking its protection against an eventual legal liability. But a person, who is as yet no creditor, and who may never become one, is claiming to force out of the hands of the executor the utmost extent of what can ever become due. I cannot make such a decree, without laying it down as a rule, that, whenever a person bound in an obligation of this sort dies, a court of equity will compel his executor to bring into Court the whole amount of the penalty of the bond. I can find no trace of the exercise of any such jurisdiction, and therefore must dismiss the bill.

Bill dismissed, with costs.

(*a*) See *Simmons* v. *Bolland*, ante, p. 547.

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W. landlord to P., having the power to distrain for rent in arrear, and having actually distrained for part, and being a creditor of P. for money lent, as well as for rent in arrear, upon P.'s representing to him that he is also indebted to G. to the amount of about 900*l.*, for which he is in fear of arrest and about to leave the country, undertakes that if P. will give up to him the farm, and execute an assignment of all his property, he will pay G.'s debt in the first instance, out of the proceeds, and apply the residue in satisfaction of his own demand, and the surplus (if any) to P., who executes a bill of sale to W. accordingly on the faith of such undertaking.

Upon the bill of G. and P., this agreement was enforced against W. to the extent of 900*l.*, the alleged amount of G.'s debt, but no further; the actual debt having proved to exceed that amount; and not prevented from having effect, either by the circumstance that P.'s property fell short of the estimated amount, or of P.'s being at the time indebted to other persons besides G. and W., which formed no part of the consideration for the agreement, although noticed in W.'s undertaking as having been represented otherwise.

The engagement not to pay G. in the first instance, not being made directly to G. but through the medium of P., by whom also the consideration was furnished, P. held in a court of equity to be a trustee for G. But *quære*, if the plaintiffs could recover at law upon such an agreement.

THE bill made the following case. In *August* 1813, the plaintiff *Gregory* being in the occupation of a certain farm as tenant to the defendant, and having a considerable farming stock and crops thereon, with the defendant's consent gave up the possession of the farm to the plaintiff *Parker*, who thereupon agreed to give him (*Gregory*) the sum of 1069*l.* 7*s.* 6*d.* (the estimated value) as a consideration for the stock and crops, of which he also took possession; and, not being able to pay the amount at the time, gave his promissory note for the same, payable on the 2d of *February*, 1815,

with

with interest. After this arrangement was concluded, *Parker* held the farm, as tenant to the defendant, till he quitted the same on the occasion of his executing the bill of sale after mentioned. On the 1st of *January*, 1815, there being a considerable amount of rent in arrear, and *Parker* being moreover indebted to the defendant 539*l.* 13*s.* for monies advanced, the defendant distrained on the premises; and *Parker* being then desirous to pay off the sums so due to the defendant, as well as his debt to *Gregory*, the defendant undertook that if he (*Parker*) would give up the farm, and assign to him (the defendant) all his stock and crops thereon, and all other his property and effects, he (the defendant) would, out of the produce thereof, in the first place pay what was due to *Gregory* on the promissory note, and apply the residue (so far as the same would extend) in satisfaction of his (the defendant's) demand, and pay the surplus (if any) to *Parker*. *Parker* consented to the terms proposed, and, upon the faith thereof, executed to the defendant a bill of sale of all his property accordingly; whereupon, for the better securing the performance of his undertaking to pay *Gregory*'s debt in the first instance, he (the defendant) gave to *Parker* the following undertaking in writing:—

"Mr. *Williams* will satisfy *Gregory*'s demand, which "he apprehends is about 900*l.*, upon *Parker*'s relinquishing possession of the farms, and assigning to "him all his property. This he consents to, that "*Parker* may, if he sees it convenient, continue in "the kingdom, and be released from all demands, "Mr. *Williams* conceiving that there are only his "and *Gregory*'s debts owing by *Parker*.—28th *Jan.* "1815."

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At this time *Gregory* was absent, and at a distance; and *Parker*, trusting to the defendant to communicate to *Gregory* the arrangement they had come to, (which he, the defendant, undertook to do,) and not doubting *Gregory*'s consent to the same, quitted the farm, and gave up his effects accordingly; notwithstanding which, the first intimation given to *Gregory* of any arrangement between them, was by a letter from the defendant's solicitor, dated the 30th of *January* 1815, and which was in the terms following:—

" Sir, Mr. *Williams* having made a distress upon Mr. " *Parker*'s goods for a considerable sum for arrears of " rent, Mr. *Parker* being also indebted to him in the " sum of 539*l.* 13*s.* on simple contract, for money lent, " and the remainder of the appraisement of stock, I " think it right to acquaint you herewith, and that he " has this day executed a bill of sale to Mr. *Williams* " for the last-mentioned sum. It appears from Mr. " *Parker*'s statement of his effects, that they amount to " nearly 2000*l.*, and Mr. *W.* has agreed that you should " share with him in proportion to the amount of your " respective demands under the bill of sale, if you " should signify your consent thereto immediately."

Upon receiving this letter, *Gregory* made enquiries for *Parker*, in order to ascertain the truth of the transaction; and not being able to find him, and unwilling to distress him, acceded to the proposal contained in the letter, upon the faith of the representation thereby made: the bill, however, alleging that he so acceded, in absolute ignorance of the defendant's having made such promise, and undertaking as before mentioned; the fact of his having done so being since made known to *Gregory* by a mere accident.

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The bill, stating these circumstances, prayed a discovery, and an account of what was due to the plaintiff *Gregory* for principal and interest on the promissory note; and that it might be declared that he (*Gregory*) was entitled to have the same paid him by the defendant out of the proceeds of the property assigned to him by the bill of sale, in the first instance, and in preference to the satisfaction of the defendant's demand; and that the defendant might account for the property so assigned, and the proceeds thereof, and pay to him thereout what should be so found due upon the said promissory note accordingly.

It appeared by the answer of the defendant, that, previous to his agreement with *Gregory* to take of him the farm which he (*Gregory*) rented, the plaintiff *Parker* had held, and then continued to hold, another farm of the defendant. That the valuation at which *Parker* took the stock and crops on *Gregory*'s farm being very high, and farming having then become an unprofitable business, the defendant, (who was a large creditor of *Parker*'s for rent in arrear and monies advanced,) upon the understanding that he (*Parker*) had no other creditor besides himself and *Gregory*, did, with a view to his (*Parker*'s) benefit, towards the end of 1814, propose and agree to take the security of his stock (estimated by *Parker* himself at 1990*l*.,) and to make an abatement in the rent of the farms; notwithstanding which, *Parker*, being under excessive alarm of an arrest by *Gregory*, shortly afterwards absconded; and thereupon, in order to relieve him from the apprehension so entertained by him, the defendant directed his solicitor to make to *Gregory* the proposal contained in his letter of the 20th of *January*, 1815, to which he (*Gregory*) acceded, as was mentioned in the bill. That on the 28th of *January*, before the execution of the bill of sale (which was also executed on the

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the 30th), the defendant sent in a distress, both upon *Parker*'s original farm for 798*l.*, and on the farm which he had taken from *Gregory* for 532*l.*, rent in arrear; and that the whole of the stock and crops on the first farm were seised under the distress on the said 28th of *January*, and the clear amount received by the defendant by sale thereof was only 433*l.* 12*s.* 8*d.*, leaving a balance of 364*l.* 7*s.* 4*d.* on the said arrear of rent thereon. That the whole amount of the stock and crops taken under the bill of sale upon the other farm was 761*l.* 15*s.* 3*d.*, leaving a surplus, beyond the rent in arrear due in respect of that farm, of 245*l.* 19*s.* 11*d.*, being all that the defendant had received under the bill of sale, and all that remained of *Parker*'s effects to pay the defendant's general debt from *Parker* of 539*l.* 13*s.*, besides the balance of 364*l.* 7*s.* 4*d.*, on the rent in arrear of the first-mentioned farm; but the defendant stated that he was willing to account with *Gregory* for his proportion of such surplus, and insisted that in so doing he would have satisfied the proposal so made on his part to *Gregory*, which (he said) was the only proposal or offer he ever made, or intended to make, to *Gregory*, for that his letter to *Parker* of the 28th was never intended by him as a promise or undertaking, but merely as a private friendly communication to *Parker*, made in the confidence that his representations of the amount of *Gregory*'s debt, and as to his being his (*Parker*'s) sole creditor besides the defendant, and as to the supposed estimate of his property to answer the same, were correct, but which turned out in every respect to be false.

He therefore submitted, that he (the defendant) ought not to be held bound by any promise or undertaking so made to *Parker*: but, if the Court should be of opinion that the plaintiffs were entitled to claim any thing of him under or by virtue of his letter of the 28th of *January*,

January, then he submitted that his (the defendant's) undertaking by that letter could not be extended beyond the amount of 900*l.*, therein supposed to be the amount of *Gregory*'s demand. He also insisted that the question, whether or not the said letter contained a valid promise or undertaking to satisfy any and what debt of *Parker* to *Gregory*, was a question altogether at law, and craved the benefit of that objection to the bill as if he had demurred thereto. He denied that the bill of sale was executed upon the conditions in the bill alleged, or upon the faith of such undertaking by the defendant as therein mentioned; but admitted that *Parker* did in fact execute such bill of sale for such purposes only as appeared by the instrument itself; whereby, after reciting that a considerable sum of money was then due and owing from *Parker* to the defendant for rent and arrears of rent, which would altogether amount to 1350*l.*, for part of which he (the defendant) had made a distress, and intended to make a distress for the remainder; and that there was also due and owing from him (*Parker*) to the defendant, for simple contract debts, the further sum of 539*l.* and upwards, which he (*Parker*) was willing should be paid and satisfied, so far as his effects, after the payment thereout of the said 1350*l.*, would extend; it was witnessed that, for the considerations therein mentioned, he (*Parker*) sold, assigned, &c. to the defendant, his executors, &c. all his live and dead stock (and other the particulars therein mentioned) to hold, &c., without rendering any account, or being accountable to him (*Parker*), otherwise than that the defendant should pay to *Parker* all monies which should come to his (the defendant's) hands from the sale of the effects, and should remain after payment of the 1350*l.*, and 539*l.*, and the costs of the distresses and bill of sale, and of settling the said effects.

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A great deal of evidence was gone into on the part of the defendant, in support of the allegations made by his answer; the effect of which may be sufficiently collected from His Honour's judgment.

Hart and *Horne*, for the plaintiffs.

Sir *Samuel Romilly* and *Wilson*, for the defendant.

[The substance of the arguments on each side may also be fully collected from the judgment.]

The MASTER *of the* ROLLS.

As things have turned out, it appears that Mr. *Williams* has entered into a very disadvantageous agreement: but the question is, Whether there be any equitable grounds on which he can be exempted from the performance of it. He was himself the judge of the advantages and disadvantages of obtaining that which he asked for from Mr. *Parker*, namely, the relinquishment of the two farms and the bill of sale of his property. He knew all his rights, and all his powers as a landlord. He knew that he had executed one distress. He knew that, in two days more, he could distrain for a further claim of rent. It was for him to consider whether he would abide by his rights as landlord, or stipulate with Mr. *Parker* for the immediate conveyance of all his property, whatever it might be, whether more or less than the amount of the rent, and for the immediate relinquishment of the two farms; and he says, I think it for my advantage to stipulate for this, though I could by distress secure the payment of the rent. The offer he makes is to pay Mr. *Gregory*'s debt, considering it to amount to a certain sum. The bill of sale is executed. He obtains what is stipulated for, and the effects are disposed of. It is impossible to restore the parties back

back again into the situation in which they stood before this agreement was entered into.

The way in which I apprehend the second agreement, or rather the letter written by Mr. *Williams*'s attorney, and which produced the acceptance on the part of Mr. *Gregory*, is introduced, is this. The plaintiffs are apprehensive that they may be met by Mr. *Williams*, with a defence that, at a subsequent period, Mr. *Gregory* had assented to a different arrangement, namely, to take his share of the surplus that might remain after the discharge of the distress which Mr. *Gregory* had laid on. Now, they say we are not bound by that assent so given, because we were kept in the dark with respect to the first engagement; and I should certainly be of that opinion, because, if Mr. *Williams* meant to propose to Mr. *Gregory* a variation of the bargain which he had been willing to enter into with Mr. *Parker*, he should have distinctly stated to him what that bargain was, and asked him whether he was willing to relinquish the benefit he possessed, and to enter into a new arrangement: but Mr. *Gregory*, at the time he consents to a second arrangement, is totally uninformed of the existence of the first; and, therefore, I conceive it is impossible Mr. *Gregory* can be bound by his acceptance of the proposition.

It is then said, that supposing it is upon the first engagement that Mr. *Gregory* is to proceed, they ought to have gone to law, and to have recovered, as upon an undertaking in writing to pay the debt of another person, inasmuch as such an undertaking is undoubtedly valid at law. Now, it may be a doubt whether they could have recovered at law upon this agreement; for the engagement is not made directly to *Gregory*; it is made to *Parker* only; and the consideration is furnished by *Parker*;

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Parker; for it is *Parker* alone that does the acts which constitute the consideration for the agreement. *Gregory* himself furnishes no part of that consideration; and he is no party to the contract. *Parker* acts as his trustee; and *Gregory* may derive an *equitable* right through the mediation of *Parker*'s agreement: but I think it would be at least questionable whether he could have maintained an action at *law*. It seems to me like the case (*a*) where a person promised the wife of an intestate, that, if she would let his name be used in the administration, he would make up the deficiency of assets to pay the intestate's debts. Lord *Hardwicke* said that that was an engagement which could be made good only in a court of equity; for that it was not made to the creditors:—that they could claim therefore only through the wife; but that they were entitled to the performance of a promise made to her, because it was to be considered as made to her in trust for them. So here, *Gregory* has a right to insist upon the benefit of the promise made to *Parker*.

Then it is said, that the engagement ought not to bind *Williams*, unless it turned out that all the circumstances were as he supposed them to be; and that, as it appears there were other debts besides his own and *Gregory*'s, he entered into the agreement under a mistake, or ra-

(*a*) *Tomlinson* v. *Gill*, Amb. 330., where also Lord *Hardwicke* says, "The plaintiff is "proper for relief *here*, for "two reasons, *first*, He could "not maintain an action at "law, for the promise was "made to the widow: but "he is proper here, for the "promise was for the bene-"fit of the creditors, and "the widow is a trustee for "them. *2dly*, The bill is "brought for an account, "and that draws to it relief, "like the common case of a "bill to be paid a debt out "of assets."

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ther upon a condition, which has not been performed, inasmuch as, there being other debts, his object has not been effected, which was to clear *Parker* of all his debts, and to enable him to remain in the kingdom if he thought fit; but I apprehend that, inasmuch as *Parker* does not disclose to *Williams* that there are any other debts, but makes a bill of sale without stating that any other exists, that is, on his part, equivalent to an assertion, that those other debts are of no consequence to the object which *Williams* and he had in view; that they are not such debts as he is likely to be harassed for, and the payment of which, or the pursuit of the creditors for which, would be likely to drive him from the kingdom. It appears, on *Williams*'s own statement, that *Parker*'s great fear was his being arrested by *Gregory*; that it was chiefly for the purpose of guarding against the consequences of his demand, that *Williams* thought it necessary to interfere; and that *Parker*'s intention to relinquish the kingdom was caused entirely by his apprehension of *Gregory*. Therefore, when *Parker* agrees to make the bill of sale, not mentioning the other debts, it is as much as if he said, I do not care for those other debts,—those will not prevent my remaining in the kingdom. I shall be satisfied with what you do for me in paying *Gregory*. Therefore I do not apprehend that this can be considered as a condition, on the failure of which there is no agreement between the parties. As to the question, whether this amounts to an agreement to pay the whole of *Gregory*'s debt, whatever it may be, or only to the extent of 900*l.*, I apprehend it can be taken only as an engagement to pay 900*l.*, unless the debt had happened to be only a trifle more than 900*l.*, so as to answer the words "about 900*l.*," and for this reason, that it does not appear that *Parker* did disclose to *Williams* what the true state of his debt to *Gregory* was;—it does

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does not appear that he informed him it was not merely 900*l.*, or about 900*l.*, but nearly 1100*l.* that was due to *Gregory*. Then could *Parker* be heard to say, when he gets *Williams* to enter into this agreement, on the supposition that only 900*l.* was due, that *Williams* should pay whatever was due? His silence at the time would debar him from setting up any such claim. It would be a fraud upon *Williams*, knowing that there was a larger sum due, to acquiesce apparently in *Williams*'s statement that it was a less sum that was due. Then, if *Parker* could not claim the payment of a larger sum, neither can *Gregory*; because *Gregory* can, in this case, claim only through *Parker*. There is no engagement with himself,—he can claim the performance of such agreement only as has been entered into with *Parker*; and I apprehend that the engagement with *Parker* must be considered to be only to pay a debt of 900*l.*, or thereabouts. I am of opinion, therefore, that it is only to the extent of 900*l.* that Mr. *Williams* has bound himself to make good *Gregory*'s debt.

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BENJAMIN VULLIAMY and B. LEWIS VULLIAMY, - - - PLAINTIFFS.

AND

WILL. NOBLE, L. WILSON, J. MORRIS, J. DORIEN, SAM. PEPYS COCKERELL, F. BOOTH, and the Governor and Company of the BANK of ENGLAND, - DEFENDANTS.

Nov. 17. 27. *Dec.* 8, 9. 12. See *Devaynes* v. *Noble*, ante, Vol. I. p. 530.

V., a customer of the banking-house of *D.* and Co., transfers to *N.*, a partner in the firm, a sum of stock by way of security for money borrowed of them, and gives notes for the amount, payable on the stock being retransferred to him. He pays off these notes, and afterwards borrows a further sum on the joint note of himself and his son, without calling for a retransfer. The stock so transferred having been blended with other stock, of which *N.* was in like manner possessed by way of security for other customers, is sold by the partnership, and the produce applied to the use of the partnership, except a small balance still remaining in the name of *N.* *D.* (another of the partners) afterwards dies, and the partnership is carried on without any alteration of firm till the surviving partners become bankrupt. On the bill of *V.* against the assignees of the bankrupts, and against the representatives of *D.* it was decided that he was entitled to the stock remaining in the name of *N.* (the other creditors in respect of stock transferred having been satisfied their demands,) as being sufficiently appropriated; to set off, against the joint note of himself and his son, so much of the money received by the partnership out of the sale of the remainder of the stock as was equal to the amount of such joint note; to prove the residue as a debt against the estate of the bankrupts; and to receive from *D.*'s estate the amount of the deficiency.

IN the year 1798, *William Devaynes*, *Thomas Croft*, *John Dawes*, and the defendant *Noble*, carried on business as bankers, in partnership, under the firm of *Croft*, *Devaynes*, and Co. During the same and the following year, the plaintiff *Benjamin Vulliamy*, who kept cash with the said bankers on his own private account, borrowed of them several sums of money, to

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the amount of 8500*l.*, and to secure the payment of the money so borrowed, signed notes, drawn by *Noble*, (one of the partners,) by which he engaged to pay to the partnership the several sums so borrowed, on their retransferring to him (the plaintiff,) or his order, certain proportional sums of stock, transferred by the plaintiff into the name of *Noble*, (amounting together to 8700*l.*, 4 *per cent.* Bank annuities, and 1425*l.* 3 *per cent.* reduced annuities,) as a collateral security for the payment of the notes. The notes were dated respectively the 10th of *May*, 1793, the 1st of *November*, 1793, and the 6th of *January*, 1794, and were for the respective sums of 850*l.*, 770*l.* 10*s.*, and 6916*l.* 12*s.* 8*d.*

In *September* 1796, *Thomas Croft* (one of the partners) retired, and *W. Close* entered into the partnership, from which time the business was carried on by *Devaynes*, *Dawes*, *Noble*, and *Close* till *Michaelmas* 1800, when *R. H. Croft* was taken into the partnership. At *Michaelmas* 1803, *Close* retired, and *Berwick* was admitted a partner; after which the business was carried on under the firm of *Devaynes*, *Dawes*, *Noble*, and Co., and continued to be so carried on by the surviving partners, without any alteration of name, after the death of *Devaynes* (another of the partners), which happened on the 29th of *November*, 1809. The bill charging that the name of the deceased partner continued to be used in the firm, as aforesaid, with the permission of his representatives.

The bill further stated, that from the respective times of their several transfers of stock, the first named plaintiff continued to keep a private cash account with the firms of *Croft*, *Devaynes*, and Co., and *Devaynes*, *Dawes*, *Noble*, and Co. as his bankers, down to the 2d of *May*, 1810, when he closed his private ac-

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count with the partnership, as after mentioned; and, during all the time aforesaid, *Noble* received the dividends of the stock transferred, and carried the same to the plaintiff's account in the partnership books.

The bill then proceeded to state, that in 1806 both the plaintiffs (father and son) borrowed of the banking-house or firm of *Devaynes*, *Dawes*, *Noble*, and Co. 300*l.*, for which they gave their joint note dated the 2d of *October* 1806; in 1807, the further sum of 990*l.*, for which they gave their joint note dated the 2d of *September* 1807; and in 1809, the further sum of 3000*l.*, for which they gave their joint note dated the 2d of *May*, 1809; amounting together to 4290*l.*, so borrowed by the plaintiffs on their joint account.

That *Vulliamy*, the father, paid off all the 8500*l*, borrowed by him on his private account (except 2750*l.*) on the 5th of *April* 1809, and took up his former notes, and gave to the firm of *Devaynes*, *Dawes*, *Noble*, and Co. a fresh note for the sum then remaining due, as follows:

"*London April* 5th, 1809. I promise to pay to the "order of Messrs. *Devaynes*, *Dawes*, and Co. the sum "of 2750*l.*, with lawful interest, for value received, "they transferring to me, or my order, 8700*l.* 4 *per* "*cents.*, and 1425*l.* red. ann., which they hold as a "collateral security. *B. Vulliamy*."

That this note was written by *Noble*, and signed by the plaintiff, and by him delivered to *Noble* for the use of the partnership, and kept by them until the amount was paid off by the plaintiff, on the 2d of *May* 1810, when the note was re-delivered to him, whereby all the private debt of the said plaintiff, for securing whereof the stock had been so transferred, became satisfied and

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extinguished, and the stock ought to have been retransferred; but the same being considered by the banking-house to remain in *Noble*'s name as a collateral security for the money advanced to both plaintiffs on their joint notes, and the plaintiff *Vulliamy*, the father, having a high opinion of the honour and solvency of the house, he (the said plaintiff) did not require a retransfer.

On the 1st of *August* 1810, a commission of bankrupt issued against the firm of *Devaynes*, *Dawes*, *Noble*, and Co., under which the defendants, *Wilson*, *Morris*, and *Dorien*, were appointed assignees; and the bill further stated that, upon the failure of the firm, the plaintiff *Vulliamy*, the father, applied to *Noble* respecting the stock so standing in his name and transferred to him as aforesaid, and demanded a retransfer, when *Noble*, to the plaintiff's great surprise, confessed that he had, with the consent, and for the use, of the banking-house, and during *Devaynes*'s lifetime, sold out the whole stock, except 1444*l.* 8*s.* 10*d.* 4 *per cents.* and 1083*l.* 19*s.* 5*d.* red. 3 *per cents.*, which last sums, he admitted, were then still standing in his name, part of the stock so transferred to him as aforesaid, and which the plaintiff required to have retransferred to him accordingly.

The bill then charged, by way of evidence, that the stock transferred to *Noble* was the property of *Vulliamy*, the father, and held by the firm only in trust for him, and as a security for payment of the money due from him to them, that they regularly gave the plaintiff credit in their books for the dividends, down to the time of their bankruptcy. It further charged that the whole of the stock (except the 1444*l.* 8*s.* 10*d.* 4 *per cents.* and 1083*l.* 19*s.* 5*d.* 3 *per cents.*) had been sold out, and the money arising from the sale thereof received by *Devaynes* in his lifetime, and by the bankrupts, or by

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Noble, by their direction, and the produce applied to the use of the partnership. That such stock was clandestinely and fraudulently so sold out and applied, the plaintiff never having been informed, or known, thereof, until after the house had stopped payment, when *Noble* acquainted the plaintiff's solicitor therewith. It insisted that the 4290*l.*, which remained due from the plaintiffs on their joint notes, ought to be set off against the produce of the stock so sold and disposed of, the amount whereof was charged by the elder plaintiff to constitute a debt to him from the firm. It charged, moreover, that the personal estate of *Devaynes* was, and ought to be considered liable to the elder plaintiff for the amount of the stock sold out, or for so much as the said plaintiff could not set off against the demand of the bankrupt in respect of the joint notes of himself and the co-plaintiff. And it consequently prayed, that the said plaintiff might be declared entitled to have the whole of the stock so transferred by him to *Noble* for the purposes aforesaid replaced by the assignees by and out of the estate of the bankrupts, in the first instance, or by the defendants *Cockerell* and *Booth*, (*Devaynes*'s executors,) out of the assets of their testator; that accordingly the sums of 1444*l.* 8*s.* 10*d.* 4 *per cents.* and 1083*l.* 19*s.* 5*d.* 3 *per cents.*, residue of such stock, might be repaid and retransferred to the plaintiff; and that an account might be taken of the stock sold out, and so much as should appear to have been sold out upon such account taken might be repurchased by the assignees, or by *Devaynes*'s executors, out of his assets, and transferred to the plaintiff; and, in case he could not have the amount thereof so repurchased, then that he might be declared entitled and be permitted, to set off so much of the money which had been received by *Noble* and his partners as should be sufficient to answer and satisfy the amount of the

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the joint notes of the plaintiffs, or so much as was then due in respect thereof, and that the notes might thereupon be decreed to be delivered up, and the plaintiff *Vulliamy*, the father, declared a creditor upon the estate of the bankrupts for the residue; and in case the Court should be of opinion that the said plaintiff could not be permitted such set-off, then that he might be declared a creditor for, and entitled to prove under the commission, the whole amount of the produce of the stock so sold and disposed of, and entitled to receive satisfaction out of *Devaynes*'s personal assets for so much of the stock as should appear to have been sold and applied to the use of the firm in his lifetime and whilst he continued a partner, so that he might receive the full amount thereof in manner aforesaid; that the defendants (the executors of *Devaynes*) might therefore either admit assets or account in the usual manner; and that all necessary directions might be given accordingly. The bill likewise prayed an injunction from sale of the stock remaining in the name of *Noble*, and from all proceedings at law in respect of the joint notes of the plaintiffs.

The defendants, *Noble*, and the assignees of the bankrupts, by their answer, admitted that, from the time of the respective transfers of stock made to him as aforesaid, to the months of *April* and *June* 1803, respectively, the defendant *Noble* received the dividends, and the same were entered in the books of the partnership to the account of the plaintiff, the father, and carried to his credit. They admitted the borrowing of the three several sums of 300*l.*, 990*l.*, and 3000*l.*, by both plaintiffs, and that for securing the payment of the last-mentioned sum, they gave their joint note dated the 6th of *May* 1809, as aforesaid; but said that, for securing the two first sums, the plaintiff, the father, gave

gave two separate notes signed by himself only; and they admitted that the said plaintiff had since paid off the whole amount of his separate debts to the partnership, as in the bill mentioned, except the amount of the two last-mentioned notes; and that the same, together with the amount of the joint note for 3000*l.*, and interest upon all of them, still remained due and owing from the plaintiffs respectively.

They admitted that no part of the stock transferred by the plaintiff to *Noble* had ever been retransferred to the plaintiff; and *Noble* said, that the reason why the same had not been retransferred, during the solvency of the house, was, because the plaintiff had always remained indebted to the house during that time. They said, that while the stock remained in *Noble*'s name, no separate or particular account was kept thereof, but the same was mixed with other stock, in the same respective funds, standing in the name of *Noble*, which belonged to the partnership, and to various other persons who had accounts with the partnership; and that the whole of such stock was carried to the general accounts of the respective funds. That in *June* 1803 there was standing in *Noble*'s name, on such mixed or general account, 24,044*l.* 8*s.* 10*d.* 4 *per cents.*, and 76,277*l.* 13*s.* 10*d.* 3 *per cents.*, and the further sum of 12,000*l.* 4 *per cents.*, in the name of some one or more of the remaining partners of the firm, and on account thereof; which several sums of 24,044*l.* 8*s.* 10*d.*, and 12,000*l.* 4 *per cents.*, and 76,277*l.* 13*s.* 10*d.* 3 *per cents.*, were then respectively applicable to the payment, as well of the stock transferred by the plaintiff, as of that belonging to the several other persons who had claims thereon respectively. That, between the month of *June* 1803 and the month of *November* 1809, the defendant *Noble*

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at times received into his name several other sums of the like respective stocks, both on account of the banking-house and of other persons, which were in like manner carried to, and blended with the two general accounts aforesaid; and that he also, during such last-mentioned period, from time to time sold or transferred out of the said mixed or general funds, various parts thereof, as occasion required, so that the aggregate amount of the said funds was, during all that time, continually varying. They admitted, that there were then standing in the name of *Noble*, the 1444*l.* 13*s.* 10*d.* 4 *per cents.*, and 1083*l.* 19*s.* 5*d.* 3 *per cents.* stated in the bill, and that the same had always been standing in his name, ever since the plaintiff's stock had been so transferred to him: but they said that the same were the respective balances of the said two general accounts, and appeared to have arisen from various purchases and sales of such stocks respectively, with which the plaintiff's original stock had no connection. They admitted that the whole produce arising from the sale of the plaintiff's stock was received by, and applied to the use of the firm, and that the interest and dividends thereof, after the same was sold out, were continued to be carried to the plaintiff's credit on his account with the firm: but they denied that this was done with any fraudulent design towards the plaintiff, and said that the firm was always ready, during its solvency, to have retransferred the same to the plaintiff at his request, and on payment of what was owing from him; and they submitted whether, under all the circumstances, the plaintiff was entitled to such set-off as was claimed by the bill, and whether the defendants, notwithstanding such sale, ought not to be permitted to sue the plaintiffs respectively on the notes so due as aforesaid, and particularly upon this joint note for 3000*l.*, if they refused to take up and pay the same.

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They insisted that the plaintiff was not entitled to have the 1444*l.* 8*s.* 10*d.* 4 *per cents.*, and 1083*l.* 19*s.* 5*d.* 3 *per cents.*, remaining in *Noble*'s name, transferred to him, inasmuch as the said sums were not (except as to some very small part thereof) parcel of his original stock, but had arisen, in the manner before mentioned, from subsequent purchases and sales of stock unconnected therewith; but that the same ought to be considered as part of the general estate of the bankrupts, and the plaintiff only entitled to prove under the commission in respect of such demand as he might be able to establish thereon.

There was evidence in the cause, the material facts of which may be collected from the arguments and the judgment.

Sir *A. Piggott*, *Trower*, and *Roupell*, for the plaintiffs.

The answer, which has been read, comprehends all the facts which constitute the equity of this case.

In 1793, the plaintiff, *Benjamin Vulliamy*, had occasion for a sum of money, which he borrowed of the house of *Devaynes* and Co., and for the repayment of which he gave notes, and pledged certain sums of stock as a collateral security, which stock was transferred accordingly into the name of *Noble*, one of the partners in the firm. In *November* 1809, *Devaynes* died: but his name remained in the firm down to the time of the bankruptcy, with the assent of his representatives. The plaintiff continued, during all this time, to keep a private cash account with the house. In 1806, he borrowed 300*l.* for which he gave his separate note. In 1807 he borrowed the further sum of 990*l.*, for which he gave his separate note also. And in *May* 1809 both plaintiffs gave their joint note for 3000*l.*

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All these transactions took place in *Devaynes*'s lifetime. Before the death of *Devaynes*, all the debts owing by the plaintiff to the partnership had been paid, except what was due upon the last-mentioned notes. At that time it appears that there was no stock remaining which could have been transferred; however, the plaintiff did not apply for a transfer, having no suspicion as to the responsibility of the house. Now it is contended, that the sums which are due on these notes, particularly the last of them, (that for 3000*l.*) constitute a different debt from that for the security of which the stock had been transferred into the name of *Noble*, from the circumstance of its being a joint debt. But we must attend to what was at the time the actual situation of the parties, in order to see whether the circumstance of its being a loan to the father and son jointly, instead of to the father only, does in this case make any real difference. Considered as a loan to the father, it was (in fact) a loan to him of his own money; for the stock had at that time been sold, and the produce (which was the plaintiff's own) had been unjustly appropriated by the partnership. What can afford more decisive evidence of an understanding between the parties, that the stock should remain a security for the joint and separate debt, than its having been suffered to continue in *Noble*'s name, after all the original debt had been paid off, and after the new joint and separate debt had been contracted? With regard to the acts of *Noble*, committed without the privity or consent of the plaintiff, they can make no difference in the nature of the plaintiff's rights. The plaintiff did not sanction the violation by *Noble*, of his duty as a trustee, by blending the stock committed to him by the plaintiff, with the stock committed to him by other persons. It is this circumstance which constitutes the difference between the present case and all those which were

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were before the Master of the Rolls, upon the exceptions to the Master's Report. The stock transferred into the name of *Noble* was so transferred to him as a trustee for the plaintiff. If he had performed his duty, that stock would now be remaining in the Bank of *England*, and there could be no question as to the plaintiff's right to have it specifically retransferred. As that is not the case, he contends that he is entitled to have it replaced, or to have the notes for which it remained a security delivered up to him as being substantially satisfied out of the produce of the stock sold, and the residue made good. With regard to the stock admitted to be still remaining in the name of *Noble*, it is clear that the plaintiff is specifically entitled to the 4 *per cents.*, because it is also admitted, that the whole amount of that description of stock, which had been committed to him by others, had been restored (*a*); and as to the 3 *per cents.*, although it cannot be traced with equal certainty to be specifically a part of the plaintiff's property, yet the fact that it is so, is made to appear highly probable.

The case against *Devaynes*'s estate (the equity of which is now settled) is that his assets are clearly responsible for the deficiency of the partnership estate to make good these demands, and that they may be followed in this Court for such purpose.

Most of the questions which will here be agitated, were before the Master of the Rolls in *Devaynes* v. *Noble* (*b*), to which it is now necessary only generally to refer. But, with respect to the responsibility of *Devaynes*'s estate, His Honour's observations on that

(*a*) This fact appeared by the schedule to the answer.

(*b*) Ante, Vol. I. 529. Ex parte *Kendall*, 17 Ves. 514.

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part of *Clayton*'s case, which relates to the exchequer bills sold by the house in *Devaynes*'s lifetime, and the produce applied to the use of the partnership, particularly apply. (*a*)

Sir *S. Romilly* and *Palmer*, for the defendants (the assignees).

The questions which concern us are two, first, as to the stock admitted to be remaining in the name of *Noble*, whether the plaintiffs are entitled to have it transferred to them. Secondly, whether they are entitled to set off the produce of the stock sold against their notes remaining in the hands of the assignees. The rest of the case concerns only *Devaynes*'s representatives.

Now, as to the stock remaining, and with regard to the 4 *per cent.* stock particularly, it is said, that it must belong specifically to the plaintiff *Benjamin Vulliamy*, because all stock of the same description which belonged to the other customers of the house has already been retransferred to them. But, when the case is thus represented, the circumstances of it appear to have been forgotten. It might indeed be so said, supposing the stock had always remained in the name of *Noble*; but that was not the case: it was from time to time transferred into other names, sold out, and fresh stock purchased. At one period it was reduced to 444*l.* 8*s.* 10*d.* That sum was unquestionably not *Vulliamy*'s, because at that time (5th *April* 1805) there were many sums of stock belonging to different customers of the house, which had been sold out, and not yet replaced. It is impossible to say, then, that this is *Vulliamy*'s stock, that it is the same identical stock

(*a*) P. 578, 579.

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which *Vulliamy* had transferred to *Noble*. With regard to the whole of this stock, the 4 *per cents.* as well as the 3 *per cents.*, it is evident, therefore, that the plaintiff is only entitled to stand in the situation of a person having a claim on the house in respect of stock transferred to the house as a security, and sold by them in violation of their engagement. The partners, also, are not the same as at the time when the stock was sold, and the breach of trust thereby committed. *Barwick* was admitted into the house afterwards; and, subsequently to his becoming a partner, stock was purchased to a considerable amount. However, there is no pretence for saying that the stock is to be considered as a security, even for more than the sums actually advanced by *Vulliamy* on his own separate account, not, therefore for the 3000*l.*, for which the plaintiffs gave their joint note.

In support of this part of the argument, *Adams* v. *Claxton* (*a*) was referred to; and on the question of set-off, *Ex parte Stephens* (*b*), and *Ex parte Hanson*. (*c*)

Leach, *Wetherell*, and *Abercrombie*, for the defendants (representatives of *Devaynes*.)

The notes first given furnish, upon the face of them, evidence of the nature of the transaction, which was that the stock transferred was not to stand as a security for the general balance, but for particular advances, a fractional part of such stock being to be retransferred upon the payment of each separate note.

Each successive partnership, as one partner died or retired, and another was admitted stood to the plain-

(*a*) 6 Ves. 228.
(*b*) 11 Ves. 24.
(*c*) 12 Ves. 346. And see 18 Ves. 232. 1 Rose, 156. 273. and *Addis* v. *Knight*, ante, Vol. II. 117.

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tiff in the same situation as the partnership immediately preceding: in other words, became a debtor to him for the stock deposited. This the assignees do not dispute. It is assumed, and taken for granted. To many of the objects sought by this bill it is the duty of *Devaynes*'s representatives to lend their assistance. *Noble* was constituted by the partnership, and by *Vulliamy* himself, a trustee for *Vulliamy*. He was also a trustee for other persons besides *Vulliamy*. The plaintiff's original stock cannot be considered as standing in *Noble*'s name; for it is certain that nothing of that original stock was remaining at the time of the bankruptcy. But why was that stock transferred into the name of *Noble*, which was found standing in his name at the time of the bankruptcy? It was so transferred in order *pro tanto* to enable him to execute the several trusts which had been reposed in him. There is a long detail of transfers of stock in the answer: but the only question on the record is, whether the stock is there now upon trust for *Vulliamy* or for the general estate of the banking-house. It cannot be in trust for the banking-house, and therefore must be for *Vulliamy* only.

The next question is as to the claim of set-off. And admitting the bankrupts to be debtors for the amount of the stock by having assumed the debt of the prior partnership, upon what principle can this claim be resisted? It is a perfectly good ground of equitable set-off, notwithstanding the joint liability of the father and son.

On this part of the case, indeed, the assignees threw out a point of some difficulty: but they did not rest upon it. *Barwick*, individually, was never a debtor: and yet, when he assumes the liabilities of the banking-house by becoming a partner, he constitutes himself a debtor in

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respect of those liabilities. He holds out to the public that he is responsible. But, morally speaking, it would be attended with some difficulty to attempt to make out that he ought not to be held liable. He had been a clerk in the house for many years. And can it be presumed that he was so ignorant of the concerns of the house as not to know of the stock standing in the name of *Noble*, and of the manner in which it had been converted? Suppose that he was ignorant, however, yet, where one of two innocent persons must suffer, there can be no question that a partner, not choosing to enquire into the state of his house, is less an object of compassion than a mere stranger confiding in the assurances made to him.

What we have to contend is, that, when the plaintiff states that he has assumed the several partnerships as they were formed in succession, for his debtors, the effect of his so assuming each successive partnership in its turn, is to release the prior partnerships. True, the plaintiff says to the representatives of *Devaynes*, Your estate shall not benefit by the concealed fraud of your testator; and, if there were no more in the case, this would be unanswerable. But was the loss, which has accrued, really occasioned by the concealment of which *Vulliamy* complains, or by his own failure to do that which common prudence would have suggested? It is no matter whether there was concealment or not, if his loss was not the consequence of the concealment. Why did he not, in *May* 1810, call for a retransfer? He was then in a condition to do so, and the loss he has sustained is really imputable to his own negligence. From the moment when, having it in his power to call for a retransfer, he neglected to do so, *Noble* only, and not the partnership, ought to be considered as the trustee of *Vulliamy*. Can it be said, in a Court of Equity, that the estate of a deceased person is charge-

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able for a loss occasioned solely by the want of that common prudence which every man ought to exercise in the management of his own affairs?

The suit is besides defective for want of parties. Why are *Devaynes*'s representatives brought before the Court but upon the ground that *Devaynes* was a partner at the time when the fraud was committed? But, upon the same ground, any other person who was a partner at the time the fraud was committed ought equally to be made a party to the suit. *Close* was a partner until *Michaelmas* 1803, and long before that period all the stock had been sold out. Therefore it is impossible that the plaintiffs can have the relief sought by them without bringing him also before the Court; that is, supposing the Court should hold *Devaynes*'s estate liable. Otherwise, there is no necessity that the cause should stand over for that purpose.

The question in this case lies in a very narrow compass, and it is not at all the same with those which were before the Master of the Rolls in *Devaynes* v. *Noble*, and which turned on the fact of the adoption of the new firm by the creditors of the old.

[*The* LORD CHANCELLOR.

It is very difficult to establish the identity of sums of stock sold by a trustee, who is trustee for several persons as to those sums. Suppose a man holds 30,000*l.* stock in trust for different persons, and that he sells 20,000*l.*, his representatives, or his general creditors, have no right to say the remaining 10,000*l.* is part of his general estate. So far is very clear. But, suppose he has sold the whole 30,000*l.*, and has afterwards bought 5000*l.* Would that 5000*l.* be (or not be) a part of his general estate? That is the present question;

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or rather it is stronger still; for this is the act of third persons. The view in which the case was put by Mr. *Palmer* I take to be this: The stock was sold out by the old partnership, and the produce applied to the use of the old firm. The new partnership afterwards assumes the debts of the old partnership; and stock is then purchased generally. Does the circumstance of their having assumed themselves to stand in the place of the old partnership raise an inference that the stock replaced was meant to be appropriated?] (*a*)

For *Devaynes*'s representatives.

From the moment the plaintiff might have called for a retransfer and did not do so, he must be considered as having repudiated all claim upon *Devaynes*'s estate, whether he knew the stock was standing in the name of *Noble* alone, or believed it to be in the names of all the partners. If he then suffered it so to continue, he must be taken to have consented to the new partnership becoming trustees upon a new footing altogether.

[*The* LORD CHANCELLOR.

I put out of the case *Noble*'s declaration (*b*), that the stock would have been retransferred, if all the money had been paid. These are words of course, and go for nothing in my mind. The question is, whether the trust continued after the separate debt of *Vulliamy* the father was paid.]

For *Devaynes*'s representatives.

Supposing the stock had stood in *Devaynes*'s name at the time of his death, it would have been the same

(*a*) It was upon this point that the case of *Adams* v. *Claxton*, before cited, was particularly referred to.

(*b*) This was stated in the answer of the defendants, the bankrupts.

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thing; the plaintiff ought, in that case, to have called on the surviving partners. The survivors alone, and not *Devaynes*'s representatives, were the persons to transfer the stock—they were the persons to wind up the concern—to sue and be sued—to pay the debts of the partnership, and do all other acts in any way relating to the partnership. Illustrate this by the case of bailment; the bailor pays off his debt, and is entitled to call for restitution. One of his two pawnees dies. Can the bailor, by protracting a trust which has ceased, make his representatives liable? In the present case, it was as much a new bailment to *Noble*, as if *Vulliamy* had actually received the stock, and retransferred it out of his own name, into the name of *Noble*. Then it is impossible to say that, when the original purpose ceased, for which the stock was transferred to *Noble*, and the stock was notwithstanding continued in the name of *Noble*, it was not so continued for other purposes. This is more than a case of negligence. There was an actual design to alter the nature of the transaction. If *Devaynes*'s estate is indeed liable, *Close* or his representatives ought to be before the Court.

[*The* LORD CHANCELLOR.

No; you contend that, as *Devaynes* went out of the house, the continuing partners took the fraud upon themselves; and *Devaynes*'s estate, if to be touched at all, cannot be touched till there is a deficiency of all the other partners. If so, then *Close*, who went out of the partnership before *Devaynes* died, cannot be touched except in case of a deficiency of *Devaynes*'s estate.]

For *Devaynes*'s representatives.

The circumstance which distinguishes the presen case from all the others that have arisen out of this bankruptcy is, that this is a transaction of a peculiar

nature

nature between individuals, not necessarily arising out of their situation as bankers and customers. The reason that *Vulliamy* did not call for his stock, when he was in a situation to call for it, was, because he had reliance on the new partnership, and having such reliance, entered into a new contract with them. Here then the transaction was completely altered, and all privity with the estate of *Devaynes* ceases.

Sir *A. Piggott* in reply.

It has been said, the stock cannot be identified. But this is a case in which there has been a trust account of stock, and it is only necessary to recur to the schedules, to see that all the *cestui que trusts*, except *Vulliamy*, have been fully satisfied by a retransfer of the stocks entrusted to *Noble*; and what is left is not sufficient to answer *Vulliamy*'s claim. How then can it be said, that this balance does not specifically belong to *Vulliamy*? If it was considered as the property of the house, how comes it that it was not sold out to meet the distresses of the house? It is enough that it was left unapplied, to shew that the house did not so consider it. But, if not the property of the house, whose property was it but *Vulliamy*'s? It is clear upon the evidence, that this stock was suffered specifically to remain, for the express purpose of repaying *Vulliamy pro tanto*; and this is admitted by the very argument upon which most stress has been laid on the other side; that argument supposing that the other *cestui que trusts* have not been satisfied.

The obligations of the house were in no respect altered or varied by the circumstance of *Barwick*'s being taken as a partner into it. *Barwick* was admitted, as a partner, in 1803, having for several years previously acted as a clerk to the house. No notice was given of

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his admission, and no change of firm took place. By this simple statement, the Court is relieved from the necessity of considering any nice questions of law, as to the liabilities of partners entering into a house, in respect of its previous transactions.

[*The* LORD CHANCELLOR.

Where one who has been employed as a clerk in a banking-house becomes a partner, he must certainly be taken to have known something of the state of the accounts of the house during the time that he was so employed by it; to have been generally acquainted with the transactions of the house during that period. And here, besides, the same transactions continued, to a certain extent, to be still carried on, after he became a partner.]

In reply.

Upon the point of set-off, there can be no question, as to the two separate notes of *Vulliamy* the father, that there would be a clear set-off at law. But, as to the joint note of the father and son, can it be contended that this is not a fair case of equitable set-off? This was not money borrowed for the use of the son. The father carried on business by himself, till he admitted his son into partnership; and the money was borrowed by father and son, in respect of the trade in which they were now become jointly interested.

[*The* LORD CHANCELLOR.

The stock being the property of the father alone, there can be no doubt that, at law, he would be entitled to a set-off in respect of his separate notes; but there is a difficulty as to the joint note of father and son. What is the evidence of there having been an agree-

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ment that this stock should be held as a security for the joint debt?]

In reply.

That evidence is to be found in the nature, and in the continuance, of the transaction. And when all circumstances are taken together, and coupled with the fact, that no retransfer was called for, and the books being attended to, in which both *Vulliamys*, the father and son, are credited, and the accounts made up according to this course of dealing, and mutual understanding between the parties, it is impossible not to infer an intention that the stock of *Vulliamy* should remain a security for all the notes, both his own separate notes, and the joint note of himself and his son. It appears, too, that a joint note of the father and son was actually paid on the 6th of *October*, 1809, and that before the partnership had taken place between them. Then, how can it be doubted that this was the real nature of the transaction, when *Vulliamy* does not, on the payment of this, or of any other notes, call for a retransfer?

The LORD CHANCELLOR.

Dec. 9.

This is a bill by creditors seeking relief, due to them under every consideration which moral justice can furnish: but whether it is sought consistently with the principles of a court of equity is another question. The object of the bill is either to have the stock retransferred, or its amount specifically replaced; or else to be permitted to set off separate notes of the father as well as the joint note given by both plaintiffs, against so much of the produce of the stock (sold out under circumstances the most fraudulent) as should be sufficient to answer them.

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And it is insisted that this stock, although the sole property of *Vulliamy* the father, may be considered as connected, not only with the separate estate of the father, but with the joint debt of the father and son—not indeed at law, for it is not contended that, at law, it can be so considered; but in eqûity. The bill then goes on to pray that, if this set-off be allowed, the smaller, but, if not, the larger sum may be permitted to be proved against the estate; and, in case the sources should, altogether, be insufficient to make good the entirety of the plaintiff's demand, then that he may be declared entitled to have satisfaction out of *Devaynes*'s assets for the remainder. And the relief is prayed in this form, because it is admitted that, if *Devaynes*'s estate is liable to *Vulliamy*, it will also be entitled to throw the burthen, as far as it is possible, on the estate of the bankrupts.

The death of a partner, of itself, works a dissolution of the partnership; and the mere want of notice does not, it seems, make the estate of the deceased partner liable to the debts of the continuing partners. *Secùs*, if

There is a peculiarity in the circumstances of the present case, which distinguishes it from every other in which the liability of a deceased partner has come in question. It is an admitted fact, that no notice was given of the dissolution of the partnership by the death of *Devaynes*. But I conceive that the death of a partner, of itself, works a dissolution of the partnership; and I am not prepared to say, notwithstanding all I have read on the subject, that a deceased partner's estate becomes liable to the debts of the continuing partners for want of notice of such a dissolution. If, however, a surviving partner deals with the customers in the character of executor as well as partner, that circumstance makes it a different question; for as executor, he has a right to bind his testator's estate. The present case is therefore to be considered, not only with reference to the general doctrine, but with reference also to this special circumstance.

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The question as to the stock is of very great importance, as it may affect other cases, as well as the present.

It seems that this partnership house was in the habit of taking stock by way of security from its customers, under an obligation that the stock so taken should remain in their hands as a security, not to be dealt with except by the authority of the person making each several transfer; and that distinct accounts should be kept of the general concerns of the house, and of the trust-stock.

one of the surviving partners is an executor of the deceased.

Now the question in the present case arises through the acts of *Noble*, which must be taken to be the acts of the house. He sells out 6000*l.* of the stock so committed to him; and the question is, who are the particular individuals, parties to the trust-account, who are to be prejudiced by this act — an act, which does not destroy the interest of all, but part of the interest of each? After this first operation, he proceeds, however, so far in the sales of stock, as to have reduced the amount in his hands at one time to 444*l.* Between that period and the time of the bankruptcy the amount of stock remaining frequently varied.—It was sometimes more — sometimes less. — It turns out, however, in point of fact, that the 4 *per cent.* stock of all the other persons who had advanced stock to the partnership was ultimately replaced to their account; and, to disembarrass the case of this part of the circumstances attending it, we will now suppose that *all* the stock was so replaced with the exception of *Vulliamy*'s, which still remained in the proportion of 1420*l.* to 8700*l.*

This introduces a very peculiar novelty into the case. It has been insisted that the Court cannot decree the retransfer

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retransfer of this stock, or restrain the assignees from applying it, unless the plaintiff is able to shew either its identity, or a specific appropriation; and, if there were no particular circumstances in the case, it would certainly be matter of some novelty to say, that, if a man has sold stock in breach of trust, and afterwards buys other stock of the like description, any part of the stock so purchased can be considered as specifically the property of the *cestui que trust*. I cannot see how, in a case thus generally circumstanced, it could be so considered, unless other cases, which have been decided in this court should be taken as having established that proposition.

But in the present case, it is impossible that I should take the stock now remaining in the hands of the assignees to be the same identical stock transferred by *Vulliamy*, for it is palpably not so. And, with respect to appropriation, though it is difficult to say that the stock repurchased was specifically appropriated to supply the place of that which had before been sold out, I do not think that I am stretching the principle too far when I say, if the transactions prove that the banking house intended *Noble* to be a trustee for the benefit of persons depositing stock by way of security for advances made by them, then the *cestui que trusts* have a right to consider the stock repurchased as being distinguished by a species of ear-mark in their favour.

Upon this part of the case, I am consequently of opinion that *Vulliamy* has a right to the stock remaining in the hands of the bankrupts at the time of the bankruptcy.

With regard to the question of set-off, I must require the facts of the case to be laid before me more

clearly

clearly in order to enable me to decide it with satisfaction to myself. But I will now make such observations as have occurred to me respecting it, begging to be set right, if I have mistaken any of the circumstances, when it comes on again to be spoke to.

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I have no doubt that, with regard to so much stock as was sold out contrary to the trust reposed in *Noble*, the person who was the owner of the stock is now a creditor of the house for the amount of it.

The difficulty throughout this part of the case is that in which *Vulliamy* has involved himself, owing to the circumstance of his having signed papers (which cannot but be taken against him), stating the particular purposes for which this stock was specifically pledged. And, notwithstanding what is represented as matter of fact arising out of the banker's books, it cannot be doubted that, in 1809, there was an engagement to retransfer the stock upon payment of the 2750*l.* then remaining due from *Vulliamy* to the banking-house.

Now, *Noble*'s declaration, that the stock would have been transferred if the whole of the debt due to the house had been paid, I consider as amounting to nothing. A banker is likely enough to say so; and I take that as no evidence whatever of the fact. There is no doubt that, in point of law, actions might have been brought, and that such actions could not have been met by a set-off, but only by bringing other actions. I apprehend also, supposing *Vulliamy* had died without assets to pay his debts, that *Noble* would have been a trustee for *Vulliamy* and his creditors, and not for the banking-house, and that the stock would have constituted a part of *Vulliamy*'s general assets.

It

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It is quite clear, therefore, if the transaction had been then put an end to, that, upon *Vulliamy*'s paying the 2750*l.* remaining due on the security of the stock, he would have been a creditor for money had and received, to the amount of the money which had been produced by the sale of the stock.

A joint debt cannot be set off against a separate debt at law; but may, in equity, under particular circumstances; as where there is a clear series of transactions in which joint credit has been given.

If to that amount, then the question arises, how the debts which *Vulliamy* owed to the house, or which the house owed to *Vulliamy*, are to be arranged. At law, a joint debt cannot be set off against a separate debt. Therefore, the point of law is against his claim; and it is incumbent on him to make out, that, with reference to this simple state of facts, there is some principle of equity different from the legal principle. If this can be so maintained, I shall be glad to have it so. On the other hand, there is no doubt that, under particular circumstances, a joint debt may be set off against a separate debt, in equity. If there are such particular circumstances in the present case, as would justify the interference of a court of equity in allowing a set-off, I should be glad to have them very clearly and concisely brought before me. If you can shew a clear and distinct series of transactions, in which both the *Vulliamys*, father and son, have had credit given to them, as credit was given to the father only, you have certainly very strong evidence of such a case as would authorize a court of equity in allowing the set-off.

But there are other points in the case to which it may be expected that I should advert. It has been stated that, because *Barwick* came into the house at the time when he entered it, that circumstance makes a difference;—that he assumed the debts of the house, and is as much bound as the others. I think not;—
there

there is no reason to make *Close* a party. I take it as a fact that there was in his time a conversion, and *Barwick* must be considered as having taken upon himself all obligations that *Close* was under.

The remaining question is, has the plaintiff a right to go against *Devaynes*'s estate for the deficiency?

With regard to that question, I cannot take it that *Devaynes* was not to be considered as at the time of his death under an obligation to replace the stock which had been sold out in his lifetime. It cannot be disputed that he was subject to such liability. Nor can it any more be made a question that a deceased partner's estate must remain liable in equity, until the debts which affected him at the time of his death have been fully discharged. There are various ways in which the discharge may take place; but discharged they must be before his liability ceases. I remember a time when the point was doubted, as in *Hoare* v. *Contencin* (a): but it is now completely settled, that the representative of a deceased partner may be sued in equity. This, however, cannot take place if the debt has been in any manner discharged; and it was therefore very fairly urged, that this debt had actually been discharged in *May*, 1810, when *Vulliamy*, with the note in his hand, paid the 2750*l*., but did not call for a retransfer. It cannot be stated, that he was not then in a condition to call for a retransfer, because he did not know that the stock was no longer where he had placed it. On the contrary, the other parties did know that the stock was not there. *Devaynes*, at the time of his death, knew that the stock was not there. How can it be said that, under such circumstances, a new contract is to be inferred

(a) 1 Bro. 27.

from

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from the silence of *Vulliamy*? If *Vulliamy* had asked for the stock, *Noble* must have told him there was none; and that is direct evidence that, at the death of *Devaynes*, all the then partners were debtors to *Vulliamy* for money had and received. Am I to say, then, that the obligation *Devaynes* was under at his death is cancelled, because *Devaynes* did not inform *Vulliamy* of the breach of trust committed in his lifetime?

I therefore think, that *Vulliamy* has made good his claim against *Devaynes*'s estate for the amount of the deficiency.

As to the point of set-off, I repeat that I wish it again to be spoke to."

Dec. 12.

On this day the question of set-off came on to be spoke to, as desired by the Lord Chancellor.

Sir *A. Piggott*, *Trower*, and *Roupell* for the plaintiffs,

Insisted that this case could not be distinguished in principle from that of *Ex parte Stephens* (a), where the decision turned expressly on the fraud which had been committed, and not on the notion of establishing any abstract rule of equity, as differing from the rule of law with regard to set-off in general. They went on to compare the two cases, and cited *Ex parte Hanson* (b) as confirmatory of the same principle, contending that there could be no higher equity in the case of a surety,

(a) 11 Ves. 24.

(b) 12 Ves. 346. before Lord *Erskine*. Affirmed by Lord *Eldon*, 18 Ves. 232. See, also, 1 Rose, Bankr. Ca. 156. *Addis* v. *Knight*, ante, Vol. II. 117. Ex parte *Ross*, 1 Buck's Bankr. Ca. 128. note.

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than of a co-obligor, and that it would be contrary to every rule of justice to adopt any distinction between them. They also insisted, that being a case of such gross fraud, the plaintiffs were entitled to costs out of the bankrupt's estate.

The only point in which this case differed from *Ex parte Stephens* was, that here it was a joint note, in the other joint and several, which made the present case the stronger of the two in favour of set-off.

Wetherell for *Devaynes*'s executors, argued in favour of the same position.

Sir *S. Romilly* and *Palmer*, contrà.

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The case of *Ex parte Hanson* does not apply to the present. There *A.* and *B.* gave a joint undertaking in respect of a debt due from *A.* only. This was quite different from a case of set-off.

But the case of *Ex parte Stephens* went upon this. There the sister of a person who was debtor to the banking-house gave her personal undertaking for the debt of her brother, being at the time ignorant that the bankers had money of hers in their hands, for which they were accountable, and which she prayed by her petition might be set off against that particular debt. That is precisely the present case. You are right, therefore, in this point as to the set-off, and must have your costs, to which the two estates, of the bankrupts, and of *Devaynes*, must contribute proportionally.

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In order to obtain an injunction against violation of a patent, the party must, at the time of applying, swear as to his belief that he is the original inventor.

Where there has been a length of exclusive enjoyment under a patent, the Court will grant an injunction in the first instance, without previously putting the party to establish his right by an action at law. Otherwise, where the patent is recent.

HILL *v.* THOMPSON and FOREMAN.

THE bill prayed an injunction to restrain the defendants "from selling or in any manner disposing of any iron smelted and worked or otherwise "produced by them, or by any person or persons on "their behalf, by the means or use of the plaintiff's in"vention and improvements (in the bill mentioned); "and from using slags or cinders and mine rubbish and "lime, according to the plaintiff's said invention and "improvements; and from in any manner using the "said invention and improvements in the smelting and "working of iron, and from otherwise infringing the "plaintiff's patent (in the bill also mentioned) during "the remainder of the term thereby granted."

The affidavits in support of the injunction (which was moved for and obtained upon the filing of the bill until answer or further order), stated the letters patent, dated the 26th of *July*, 1814, for the plaintiff's invention, which was alleged to consist in the use and application of the slags or cinders thrown off by the operation of smelting (which had previously been considered as useless) to the production of good and serviceable metal, by the admixture of mine-rubbish and otherwise, according to principles of the plaintiff's own discovering.

The defendants moved, on the coming in of their answer, to dissolve the injunction; and upon this occasion a variety of affidavits were produced on both sides,

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sides, tending respectively to impeach and to assert the validity of the patent, and of the injunction to restrain the breach of it. An affidavit made by the plaintiff referred to the specification of his invention lodged in the Patent Office, alleging that he verily believed he was the inventor of the several improvements in smelting and working iron which were therein mentioned; and the specification referred to contained an explanation of the principles of the alleged invention, which was extremely diffuse, and objected to on the other side as either wholly unintelligible, or so confused and intricate as not to be capable of being reduced to practice. It was further objected that, except by reference to this obscure specification, neither the plaintiff, nor any of his witnesses, had stated in what the alleged invention and improvements consisted, nor whether he claimed in respect of invention or of improvements merely; and that a patent, to be good, must not be more extensive than the invention. The defendants' affidavits also went to deny the originality of the invention altogether. *Rex* v. *Else* (*a*), *Boulton* v. *Bull* (*b*), *Hornblower* v. *Boulton* (*c*), and *Harmer* v. *Plane* (*d*), were cited, on the part of the plaintiff, in answer to the objection to the specification.

The case was argued on several occasions, and at considerable length.

Sir S. *Romilly*, *Bell*, and *Phillimore*, for the defendants, in support of the motion to dissolve the injunction.

Trower, *Wetherell*, and *Raithby*, contrà.

(*a*) 11 East, 109. note.
(*b*) 2 H. Black. 463.
(*c*) 8 T. R. 95.
(*d*) 14 Ves. 130.

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Said, he doubted whether the injunction ought to have been granted in the first instance, unless the affidavits had stated more particularly in what the alleged infringement of the patent consisted; and that it should have been shewn to be, by working in the precise proportions mentioned in the specification, as being of the essence of the invention. That when, in future, an injunction is applied for *ex parte*, on the ground of violation of a right to an invention, secured by patent, it must be understood, that it is incumbent on the party making the application to swear, at the time of making it, as to his belief, that he is the original inventor; for, although when he obtained his patent, he might very honestly have sworn as to his belief of such being the fact, yet circumstances may have subsequently intervened, or information been communicated, sufficient to convince him that it was not his own original invention, and that he was under a mistake when he made his previous declaration to that effect.

The principle upon which the Court acts in cases of this description is the following:—Where a patent has been granted, and an exclusive possession of some duration under it, the Court will interpose its injunction, without putting the party previously to establish the validity of his patent by an action at law. But where the patent is but of yesterday, and, upon an application being made for an injunction, it is endeavoured to be shewn, in opposition to it, that there is no good specification, or otherwise, that the patent ought not to have been granted, the Court will not, from its own notions respecting the matter in dispute, act upon the presumed validity or invalidity of the patent,

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patent, without the right having been ascertained by a previous trial; but will send the patentee to law, and oblige him to establish the validity of his patent in a court of law, before it will grant him the benefit of an injunction.

In the present case, I shall say nothing as to my opinion of the validity or invalidity of the patent. The affidavits in support of the injunction represent, that the defendants have made iron in the way mentioned in the specification. But, whether it is to be considered as a patent for extracting iron from slags or cinders, by working and smelting, and by the admixture of certain materials, to reduce the *per centage* to 40 *per cent.*; or for mixing cinders, limestone, and mine-rubbish in certain proportions; it should, before any injunction was granted, have been pointed out that the patent was actually infringed by so mixing the ingredients, or so reducing the *per centage.* Here, I cannot but entertain a doubt, whether the improvement as to the lime destroying the cold-short is, or is not, a new invention; but that is not for me to decide; and, if on the trial of an action, the witnesses should prove the use of lime for the same purpose, previously to the grant of this patent, still another question will remain, admitting that a patent may be good, for a mere method of producing a more beneficial and effectual result from the adhibition of the same materials.

But it is enough, in the present case, to resort to the principle already laid down, and which is the same that governed the cases (which have been cited) of *Harmer* v. *Plane* (*a*), and *Bolton* v. *Bull* (*b*); because it cannot be said, that there has been, in this case, such a possession or enjoyment under the patent, as

(*a*) 14 Ves. 136. (*b*) 3 Ves. 140.

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would induce the Court to continue the injunction, upon such evidence as is here afforded, until its validity has been tried at law. Here the patent bears date *July*, 1814, and the specification *January*, 1815; and it appears by the affidavits, that the works were not completed so as to carry on the operations under the patent until *July*, 1816.

His Lordship accordingly dissolved the injunction; but directed that an account should be kept of slags used and iron made by the defendants, according to the method described in the specification, the plaintiff undertaking to bring an action; with liberty to apply to have the injunction revived, after trial of the action, or in case of any unreasonable delay being interposed on the part of the defendants.

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An action was brought accordingly, and the result of the trial, was a verdict in favour of the plaintiff; who now moved to revive the injunction.

In support of the motion, it was represented to be clearly settled at law, that there may be sufficient novelty to support an injunction as well in a mere improvement upon an old method as in an original invention. The verdict of the jury was also stated to be conclusive as to the matter of fact, and the application now made as of course, and such as the Court could not refuse, without taking upon itself to meddle with what was the exclusive province of a Court of law.

On the other hand, it was stated to be the intention of the defendants to move for a new trial at law, which could not be done before the next term, but that the motion would then certainly be made, and

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with every prospect of success, on the ground of the verdict being pronounced against evidence; it having been clearly proved on the trial, that, previously to the grant of this patent, iron had been extracted from slags or cinders, by precisely the same process as that described in the specification. That the trial was at *nisi prius*, where little opportunity is afforded for that consideration on the part of the Judge, which, in such a case as the present, was necessary to enable him properly to direct a jury. That the order, giving liberty to the plaintiff to apply to the Court to revive the injunction, left it at the discretion of the Court to grant, or to refuse, the application; and that, in the present case, its being revived would be attended with the greatest inconvenience and loss to the parties, in case, by the event of a new trial, they should be found to have a right to continue the works which had been commenced by them in consequence of the patent being ultimately pronounced to be invalid. That the verdict itself could not be considered as in any respect final or complete, till it were known whether it should stand, or abide the event of the new trial. That, in the direction of the Judge to the jury, it was expressly stated, that the patent was for the invention of certain improvements in the smelting and working of iron obtained from slags or cinders, and it, therefore, was a point still to be proved, if the contrary were insisted on, that the same thing had never been effectually accomplished before; whereas there was abundance of evidence, that the very same thing had been habitually practised in *Staffordshire* and *Shropshire*, although it might be true that it had not been resorted to in *South Wales*, where the works in question were situated.

To all this it was replied, that the injunction must be revived, as a matter of course, the verdict having been

 obtained;

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obtained; and that to oppose it was, in effect, no other than to apply for a new trial to a Court incompetent to award it. That, in the opinion of the Judge who directed the verdict, it was clearly a patent for an improvement, and not for an original invention; and that the verdict pronounced agreeably to that direction gave a *primâ facie* right to the plaintiff, upon which the Court could not refuse to act.

The Lord Chancellor.

In this case the injunction was first granted upon the strength of affidavits, which were contradicted as to their general effect, in the most material points, when it afterwards came before the Court upon a motion to dissolve the injunction so obtained. Many topics were then urged on both sides, and fully discussed in argument. It was insisted, on the part of the plaintiff, and the Court agreed to that position, that where a person has obtained a patent, and had an exclusive enjoyment under it, the Court will give so much credit to his apparent right, as to interpose immediately by injunction to restrain the invasion of it, and continue that interposition, until the apparent right has been displaced. On the other hand, it was, with equal truth, stated, that if a person takes out a patent, as for an invention, and is unable to support it, except upon the ground of some alleged improvement in the mode of applying that which was previously in use, and it so becomes a serious question, both in point of law and of fact, whether the patent is not altogether invalid, then, upon an application to this Court, for what may be called the extra relief which it affords on a clear *primâ facie* case, the Court will use its discretion; and if it sees sufficient ground of doubt, will either dissolve the injunction absolutely, or direct an issue, or direct the party applying to bring his action; after the trial of which, either he

may

may apply to revive, if successful, or else the other party may come before the Court, and say, I have displaced all his pretensions, and am entitled to have my costs and the expenses I have sustained, by being brought here upon an allegation of right which cannot be supported. And, as in this instance, the Court will sometimes add to its more general directions, that the party against whom the application is made, shall keep an account pending the discontinuance of the injunction, in order that, if it shall finally turn out that the plaintiff has a right to the protection he seeks, amends may be made for the injury occasioned by the resistance to his just demands.

To establish the validity of a patent, the invention must be both new and useful, and the specification must accurately describe it. Also, if the specification seeks to cover more than is actually new and useful, it vitiates the patent, rendering it ineffectual even to the extent to which it might otherwise have been supported.

In his directions to the jury, the judge has stated it as the law on the subject of patents; first, that the invention must be novel; secondly, that it must be useful; and, thirdly, that the specification must be intelligible. I will go farther, and say, that not only must the invention be novel and useful, and the specification intelligible, but also that the specification must not attempt to cover more than that which, being both matter of actual discovery, and of useful discovery, is the only proper subject for the protection of a patent. And I am compelled to add, that, if a patentee seeks by his specification any more than he is strictly entitled to, his patent is thereby rendered ineffectual, even to the extent to which he would be otherwise fairly entitled. On the other hand, there may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials. But, in order to its being effectual, the specification must clearly express that it is in respect of such new combination or application, and of that only, and not lay claim to the merit of original invention in the use of the materials. If there be a patent both for a machine, and for an improvement in the use of it, and

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it cannot be supported for the machine, although it might for the improvement merely, it is good for nothing altogether, on account of its attempting to cover too much.

Now it is contended, that what is claimed by the present patent is not a novel invention; that the extraction of iron from slags or cinders was previously known and practised; that the use of lime in obstructing cold-short, was likewise known. But to all this it is answered, that the patent is not for the invention of these things, but for such an application of them as is described in the specification. Now, the utility of the discovery, the intelligibility of the description, &c., are all of them matters of fact, proper for a jury. But, whether or not the patent is defective in attempting to cover too much is a question of law, and as such, to be considered in all ways that it is convenient for the purposes of justice that it should be considered. This specification generally describes the patent to be "for improvements in the smelting and working of iron;" and it then goes on to describe the particulars in which the alleged improvements consist, describing various proportions in the combination of the materials, and various processes in the adhibition of them. The question of law, upon the whole matter, is, whether this is a specification by which the patentee claims the benefit of the actual discovery of lime as a preventative of cold-short, or whether he claims no more than the invention of that precise combination and those peculiar processes, which are described in the specification. And when I see that this question clearly arises, the only other question which remains is, whether I can be so well satisfied with respect to it, as to take it for granted, that no argument can prevail upon a court of law, to let that first question be reconsidered, by granting the motion for a new trial. If this be a question of law, I can have no right whatever to take its decision

decision out of the jurisdiction of a court of law, unless I am convinced that a court of law must and will consider the verdict of the jury as final and conclusive. But this only brings it back to the original question; and I see enough of difficulty and uncertainty in the specification, and enough of apparent repugnance between the specification and the patent itself, to say, that it is impossible I can arrive at such a conclusion respecting it, as to be satisfied that there is no ground for granting a new trial.

The injunction having been dissolved, with liberty to the plaintiff to bring an action to establish his patent right, and the defendants to keep an account in the mean while; a verdict having been obtained for the plaintiff on the trial of the action, on application being made to revive the injunction, it was objected that the defendants intended to move for a new trial; and the matter was ordered to stand over till the result of that application should be known, the parties continuing to keep the account in the interim.

In the order I formerly pronounced, was contained a direction, that the defendants should keep an account of iron produced by their working in the manner described in the injunction. If the injunction is to be now revived, the whole of their establishment must be discharged between this and the fourth day of next term, when it is intended to move for a new trial, the result of which may be, that the defendants have a right to continue the works; to do which, they will then be under the necessity of recommencing all their operations, and making all their preparations and arrangements *de novo*. It appears to me, that this would be a much greater inconvenience than any that can result from my refusal in the present instance to revive the injunction. My opinion, therefore, is, that this matter must stand over until the fifth day of next term, when I may be informed of the result of the intended application for a new trial; the account to be taken, in the mean time, as before.

Ordered accordingly.

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N. B. [I am informed that a new trial was afterwards moved for, and granted; and that the result was against the validity of the patent.]

Dec. 18, 19.

JOHN ADAM TRAUB, HENRICH SENYSLAKE, and BERNHARD TRAUB; JOHANN FREDERICK ABEGG, HERMAN HEINRICH MEYER, HEINRICH GREVE, JOHANN WILHELM KARSTENS, and ANDREAS STUCKEN, - PLAINTIFFS.

AND

GEORGE SCHMIDT, - DEFENDANT.

Attachment by the plaintiffs in the Lord Mayor's Court on property of the defendant in the hands of a garnishee. Defendant, residing at *Hamburgh*, is not summoned, and a verdict is obtained by the plaintiffs, by virtue of which the money is paid them on their giving security to restore the same in case the defendant shall, within a year and a day, appear and give bail to answer, &c. according to the custom.

Defendant appears and pleads to the jurisdiction. Plaintiffs reply; and defendant joins issue as to part, and demurs to the other part, of the replication; and obtains judgment both on argument of the demurrer and afterwards on trial of the issue.

In the interval between the two judgments, plaintiffs present a petition to the Lord Chancellor for a commission and writ of error, which are granted. Defendant now moves to supersede both the commission and writ—and the same are accordingly superseded on the ground of misrepresentation in the petition on which they issued; by which it was alleged, first, that the defendant had been summoned, when no summons had issued;—secondly, that the validity of the defendant's plea had

THIS was a motion, on the part of the defendant, that the commission of errors issued in the above cause under the great seal, and directed to Sir *Vicary Gibbs*,

Gibbs, Knt. L. C. Justice of the Court of C. P., the Lord Chief Baron *Thompson*, Mr. Justice *Abbott*, Mr. Justice *Burrough*, and Mr. Baron *Richards*, and also the writ of error in like manner issued in the said cause, and directed to the mayor, aldermen, and sheriffs of *London*, bearing date the 5th of *March*, then last, might be superseded; or that the said mayor and aldermen might be directed to carry into effect and enforce the judgment and verdict respectively given for the defendant against the plaintiffs in the Lord Mayor's Court on the 21st of *November*, 1816, and 5th of *May* then last, respectively, notwithstanding such commission and writ of error as aforesaid; and that, for that purpose, the necessary writ or writs might be awarded and issued, directed to the said mayor and aldermen.

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had been argued on a demurrer to the replication; making no mention of the defendant having joined issue as to part, which issue had not been tried at the time of presenting the petition—and other misrepresentations.

The motion was further supported on the ground of the commission and writ having been sued out merely for delay, as was manifest from the plaintiffs not having proceeded therein—it being, also, contended that, if the Court would not supersede them, the defendant ought to be at liberty to take

The case was as follows. The defendant was owner of a cargo of tea and other goods, shipped on board the *Vesta* at *New York* in *August*, 1809, and consigned to him (the defendant) at *Hamburgh*, to which port the vessel was also bound, and, in the prosecution of her voyage, was captured by a *British* cruiser, and carried into *Yarmouth*. On the 22d of *December* following, the ship and cargo were restored by a decree of the Court of Admiralty to the owners; after which the ship remained at *Yarmouth* till *May*, 1812, when she was seised by the revenue officers, in consequence of some smuggling transactions, and both ship and part of the cargo condemned and sold, and proceedings instituted by the custom-house against the remainder, whereupon a claim being made by the captain on behalf of the defendant, as owner, a compromise took place, by virtue of which 5300*l.* was to be paid to the claimant out of the proceeds, and that sum was accordingly deposited in the hands of *Henderson*, an officer in the customs, for that purpose. Afterwards, in *March*, 1814, a plaint

was

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out execution notwithstanding; such proceedings not amounting to a *cesset executio* —as to which, *quære.*

was affirmed in the Lord Mayor's Court at the instance of the plaintiffs against the defendant, in a plea of debt upon demand for 10,000*l.*, and process of attachment at the same time issued out of the said court on the sum so deposited in the hands of *Henderson*, the garnishee. The defendant being absent, residing at *Hamburgh*, was not summoned to appear and answer, and a verdict was, on the 2d of *April*, 1814, obtained in the action so commenced, against *Henderson*, for 5000*l.*, which was accordingly paid by him to the agent of the plaintiffs, upon their (the plaintiffs) the solicitor, and another person, a merchant, becoming sureties to restore the same to the defendant, in case he should, within a year and a day, come into the court, and find bail and sureties to answer, and disprove or avoid the debt, according to the custom of the city, "and there remain ready to plead with the said plaintiffs upon their bill original, or otherwise to discharge himself therefrom."

It was sworn, by the affidavit of his solicitor in support of the present motion, that the defendant had no knowledge or information of the plaint or attachment, or of any proceedings under the same, until some time after the verdict obtained, and the 5000*l.* paid, as before mentioned; but that, within the year and day, he (the defendant) came into court, and found bail and sureties according to the custom, and brought his *scire facias* to disprove the debt or discharge himself—that the plaintiffs appeared thereto, and the defendant thereupon, by the advice of counsel, pleaded that the cause of action (if any) did not accrue within the jurisdiction of the Lord Mayor's Court; to which the plaintiffs replied that, as to 2100*l.*, (part thereof,) the same *did* accrue within the said jurisdiction, and that, as to the residue, *Henderson* (the garnishee) resided within the same. To the first part of this, replication, the

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the defendant joined issue, and to the other part he demurred, as being insufficient in law. The demurrer being argued, judgment was given thereon for the defendant, on the 21st *November*, 1816; and, on the trial of the issue, a verdict was also found for the defendant, *May* 5th, 1817. In *March*, 1817, the plaintiffs presented a petition to the Lord Chancellor, alleging that the defendant, instead of disproving the debt, had pleaded in bar to the jurisdiction, and that the validity of such plea being argued on a demurrer to the plaintiff's replication, judgment was given for the defendant; therefore praying a commission of errors, and writ of error, against the said judgment; whereupon his Lordship, on the 3rd of *March* aforesaid, ordered that such commission and writ of error should issue, and the same were issued accordingly. (*a*) On the 5th of *May*, the writ was presented to, and allowed by,

(*a*) Form of the Writ of Error mentioned above, dated the 5th of *March*, 1817.

George the Third, &c. To the Mayor, Aldermen, and Sheriffs of *London*, &c. Whereas in the record and process of a certain plaint which was in our court of our city of *London* before you, &c. without our writ, according to the custom of the said city, between —— and——, of a debt of 10,000*l.* that the same —— demanded of the said ——, as, also, in the record and process of a certain attachment made thereupon before you, &c. of the said 10,000*l.* in money numbered, as of the proper money of the said ——, in the hands and keeping of one —— attached and defended. Likewise in the rendering judgment before you, &c. in our said court, &c. upon the plaint and attachment as aforesaid, as it is said manifest error hath intervened, to the great damage of the said ——, as by his complaint we are informed. We, willing that the said error (if any be) be duly amended, and full and speedy justice done to the said parties in this behalf, have assigned our trusty and well-beloved ——, or any two of them, our justices, to examine and correct the record and

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by, the deputy register of the lord mayor's court; but the affidavit further stated, that no further proceedings had been taken by the plaintiffs thereon, and no application made, or notice given to the judges named in the commission, or any of them, and that the deponent verily believed the commission and writ of error had been sued for and obtained by the plaintiffs for the purpose of delay only. That, on the 5th of *December*, he (the deponent) applied, on behalf of the defendant, to the proper officer of the said court, for a writ of execution against the two sureties aforesaid, for the

and process of the plaint and attachment aforesaid, and the giving of judgment of the plaint and attachment aforesaid, as, also, the adjudging of execution thereupon, with all things touching the same, in the presence of you, &c. by our said justices, or two of them, for that purpose convened, if you are willing to be concerned in this affair, at the *Guildhall* of the said city. And, if any error shall be found in the said record and process, or in the giving of judgment of the plaint and attachment aforesaid, or in the adjudging of execution thereupon, the same to correct and amend, and to do full and speedy justice to the said parties according to the tenor and custom of the said city. And therefore we command you, &c. that at a certain day, which our same justices, or two of them, shall make known, the record and process of the said plaint and attachment, and giving of judgment of the said plaint and attachment, and also the adjudging of execution thereon, with all things touching the same which remain with you, as it is said, before our said justices, or two of them, to the same place you cause to be brought. And we command you, (the sheriffs,) that at a certain day which our said justices, or two of them, shall make known to you, you shall give notice to the said (plaintiffs) that then they be there, if any error in the said record and process, or giving of judgment thereupon, which is known to belong thereto, and to hear further, and to do and perform what shall be ordered by our said justices in this case to be done. Witness ourself at *Westminster*, &c.

5000*l*.,

5000*l.*, to which he (the defendant) had become entitled, according to the custom of the city of *London*, and the practice of the said court, by virtue of the verdict and judgment so obtained by him as aforesaid, but which writ the said officer refused to issue by reason of the writ of error; and, further, he had been informed and believed, that *Boswell* (one of the sureties) had absconded, and was then in *America*.

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In opposition to the motion now made, as above, on the part of the defendant, two affidavits were filed on the part of the plaintiffs, by the first of which the deponent (the deputy register of the Lord Mayor's Court) stated, that no writ of error had been brought upon any plaint or action commenced in the said court, during a period of thirty-five years, that he (the deponent) had been in office, except the writ of error which was brought in the present case—that a writ of error on any plaint or action in the said court, was a very rare proceeding; but that, after diligent search among the records, he (the deponent) found that a writ of error was brought in the year 1774, on an information in the said court, between *Thomas Nugent* Esq., the then Common Serjeant, and *Samuel Plumbe* Esq., concerning the disfranchisement of the said *Samuel Plumbe*.

The other affidavit sworn by *Henry Ashley*, partner with *William Windale*, (attorney of the said court) stated, that at the time of commencing the aforesaid action, and of the subsequent proceedings, the said *Windale* was concerned as clerk in court, for the plaintiffs, and *Boswell* as their solicitor; that a commission and writ of error (as above mentioned) had been sued out by *Boswell* as such solicitor, and the same had been regularly allowed by the proper officer of the court—that the deponent had made search among the records of the court

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court for similar proceedings, and has found proceedings of that nature instituted in the said court in 1774, in a cause between *Thomas Nugent* Esq.(Common Serjeant) and *Samuel Plumbe* Esq., whereby it appeared that, after the commission to the judges named therein was obtained, and the writ of error allowed, a precept of the commissioners was issued to the Lord Mayor, aldermen, and sheriffs, commanding the appearance of the plaintiff at a certain day to hear error—that the defendant in the present cause had not taken any proceedings by virtue of his commission and writ of error, to compel the appearance of the plaintiffs, nor any further proceedings, except the application now made — that, after the writ of error in this cause was sued out and allowed, *Boswell* departed the realm for *North America*, where he then resided; and that, after his departure, the plaintiffs, by their agent, placed the papers in the hands of Messrs. *Robinson* and *Hammond*, in his (their solicitor's) absence.

The following were stated as the grounds for the application, which was now made on the part of the defendant.

First, mis-statement in the petition, upon which the writ of error was issued; *viz.* that the petition represented the defendant to have been summoned; whereas it appeared by the affidavit of his solicitor, that he was not summoned, by reason of his being resident at *Hamburgh*, which also appeared from the record of the proceedings, in these terms. "And thereupon it is "commanded by the Court to *Thomas Newcombe*, one "of the Serjeants at mace of the said Court, that he "(according to the custom of the said city) summon by "good summoners, the defendant to appear here to "answer the plaintiffs in the plea aforesaid, and that "he return and testify what, &c. And afterwards (to "wit) at the same Court, the said Serjeant at mace

"returned

"returned and testified, according, &c., that the de-"fendant had nothing within the said city, or the "liberties thereof, whereof he could be summoned, "nor was he to be found within the same."

Another objection to the petition was, that it stated imperfectly the terms of the security for restoring the 5000*l*., which appeared from the record, to be as follows. "And thereupon, at the same court, the said "(plaintiffs) found sufficient pledges and sureties (that "is to say, &c.) to restore to the said (defendant), the "said sum of 5000*l*., so attached as aforesaid, if the "said (defendant) should, within a year and a day, "according to the custom, find sufficient pledges and "sureties to answer the said (plaintiffs) in and upon "the plea of their said bill original, and to disprove or "avoid the debt demanded by the said bill, according "to the custom, or to render his body to prison within "the liberties of the said city, and there remain "ready to plead with the said (plaintiffs), and upon "their said bill original, or otherwise, to discharge "himself therefrom, according to the custom."

Besides these, were the mis-statement (already referred to) as to the validity of the plea to the jurisdiction having been argued, instead of the validity of the plaintiffs' replication to part of that plea, *viz*. "that it was suffi-"cient that the garnishee resided within the jurisdic-"tion"—that it was also omitted to be stated that, as to 2100*l*. of the 5000*l*., the plaintiffs took issue to the defendant's plea to the jurisdiction, and that the same was tried, and a verdict given for the defendant. That the petition referred only to the judgment stated to have been given on the argument of the demurrer, as being erroneous, and the writ of error made out pursuant to the order of such petition (dated the 3d of *March*) was tested the 5th of *March*, 1817, and must,

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must, therefore, have been obtained after the judgment on the demurrer was given (21st *November*, 1816), but before the trial of the issue (7th *May*, 1817), and the same could not therefore, in any event, affect the verdict and judgment as to the 2100*l*.

Then, as to the writ of error itself, it was there stated, that manifest error had intervened in the record and process of the plaint, as well as in the record and process of the attachment, and in the rendering of judgment,—making no distinction between the judgments, and not confining the error, in conformity with the petition, to the judgment on the demurrer. It was likewise imperfect in stating the errors to have intervened, to the great damage of the *defendant*, as if *he* were the party prejudiced, and for whom the writ of error had been issued.

With regard to the previous proceedings—if any objection should be made to the defendant's plea to the jurisdiction, as coming too late, it was represented, that it admitted of the following answers; first, that the non-appearance of the defendant in the action, upon which the attachment was issued, was no *laches* in him; since it appeared from the return (*nihil habet*) that he neither had, nor could have, notice of the proceedings—although it might have been otherwise, if he had made default after a return of *summoneri feci*; and upon that ground it was evident, that the *primus dies* was the day given in the *scire facias*. Secondly, that, although a plea to the jurisdiction of one of the superior courts was treated with great strictness, inasmuch as it must be intended *primâ facie*, that all causes are cognizable, and all persons justiciable, there; yet no such intendment could be made in favour of an inferior and limited jurisdiction—and that, on the contrary, if in any stage of the proceedings, it appeared on the record, that

that the original cause of action, or the defence, arose out of the jurisdiction, it was error. *Thirdly*, that if by any act or neglect of the defendant, he had deprived himself of the benefit of a plea in abatement, the plaintiffs should have relied on the estoppel in their replication; by omitting to do which, they had waived the estoppel, and set the matter at large, notwithstanding the estoppel appeared on the record; (for which purpose Co. Litt. 303. *b*., and Saund. 324., were referred to). *Fourthly*, that all the proceedings against the garnishee were considered merely as *process* to bring the defendant into court; and it was therefore conceived that any step which the practice of the Court might require to be taken, in order to get back the money which had been attached, could no more prevent the defendant from pleading to the jurisdiction, than putting in bail above in the Court of King's Bench, which are necessary to be done, in order to entitle the defendant, the sheriffs, or the bail below, to be heard.

It was further to be observed, that, according to the terms of the security, the defendant was entitled to have the 5000*l*. restored, "if he disprove, *or avoid*, "the debt, or *otherwise discharge* himself therefrom."

With respect to the case referred to in the affidavits made to oppose the motion, it was observed, that that case was a very notorious one, and had been published by the authority of the city — but that it had no bearing on the present case; both because the Common Serjeant was invested with peculiar privileges by the custom of the city, and because *there* the defendant (and not the plaintiff) had been actor and mover in obtaining the commission and writ of error, whereas, in the present, the plaintiffs had obtained the commission,

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mission, and kept it in their possession, leaving the defendant to get from the judges their precept, without any commission, and on the bare authority of a copy of the writ of error, with which the defendant was served; the whole proceeding, on the part of the plaintiffs, rendering it evident, that their sole object was delay.

Sir. S. *Romilly*, *Bolland*, (senior counsel of the Lord Mayor's Court) and [illegible] in support of the motion.

As to the question of the jurisdiction of this Court, whatever doubts may have existed formerly, it has long been settled, that the Court has power to supersede a writ, which itself has issued, either on the ground of mistake, or *quia improvidè emanavit*, as in *Barlow* v. *Collins* (*a*), where a writ *de excommunicato capiendo* was superseded on motion, as being "ill for uncertainty." There "the writ was inrolled in B. R.,—yet, being "not returned there, to prevent a failure of justice, it "was superseded in Chancery." In *The Dean and Chapter of Dublin* v. *Dowgate* (*b*), a writ of error was sued out of Chancery, returnable in King's Bench. And it was said by *Parker* C. J., (who, with *King* C. J. and *Bury* C. B., were desired by the Lord Chancellor to assist at the motion,) "that the Court of Chancery might supersede this writ, *quia improvide emanavit*."

(*a*) 1 P. W. 436. note. And see *Rex* v. *Burrard*, ib. 435.

(*b*) 1 P. W. 348 The facts were these. The archdeacon of *Dublin* had obtained a peremptory mandamus out of K. B. in *Ireland*, directed to the dean and chapter, to admit him to a stall in the cathedral church there; whereupon the dean and chapter sued out a writ of error here, returnable into K. B.; and, no return having been made, it was moved that the Court of Chancery would order the Court of K. B. in *Ireland* to make their return, and in the mean time stay all proceedings on the *mandamus*.

Wood.

Woodcraft v. *Kynaston* (*a*), was a motion to quash, or supersede, a writ of *certiorari*, which issued out of this Court, to remove a plaint of replevin in the Mayor's Court of *London*, upon the ground that the tenor of the record was only directed to be removed, and not the record itself. Lord *Hardwicke* superseded the writ, and awarded a *procedendo*.

Here, the only question on the writ is, whether the circumstances are sufficient to support the application. The first ground is error on the face of the writ. *Cooper* v. *Ginger* (*b*) where, the judgment being against two, it was held, that a writ of error, *ad damnum* of one only, would not lie, and the writ was quashed accordingly. In which case, another of *Brewer* v. *Turner* (*c*), was referred to, where the same point had been decided. This is a much stronger case than either of those, because here it is stated by the writ to be *ad damnum*, not of one, instead of two who are damaged, but of the wrong person altogether. In the case of *The Lessee of Lawlor* v. *Murray* (*d*), the questions arose upon a writ grounded on stat. *Westm.* 2. c. 31. (*e*), commanding the justices of King's Bench to affix their seals to a bill of exceptions. This writ had been served on the judges, and they, in obedience to it, had affixed their seals accordingly. Lord *Redesdale* superseded the writ; and one of the grounds upon which he superseded it was, that it was a writ which ought not to issue without a previous application to the Court, and an order made in consequence of such application.

(*a*) 2 Atk. 317.

(*b*) 1 Stra. 606.

(*c*) 1 Stra. 233. And see the first-mentioned case reported in Lord Raym. 1403., where it is stated that costs on quashing writs of error are to be given in all cases, under the stat. 4 *Ann.* c. 16. s. 25.

(*d*) 1 Scho. and Lef. 75.

(*e*) Vid. Reg. Brev. 182. a.

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Then as to the commission, and the petition on which it issued. It is by no means of course to grant a commission, which is not due as matter of right: but a previous application is necessary, which ought to contain the facts of the case. Here there has been manifest and gross misrepresentation of the facts, tending to mislead and deceive the Court. The party is stated to have been summoned, and he was not summoned. The Court is given to understand, that the plea was demurred to *in toto*, whereas the demurrer was only to part of the plea. If then it is necessary that there should be a previous application, founded on the facts of the case, to ground a commission, that would alone be a sufficient reason for superseding the commission in this instance; and the present is a much stronger case than that before Lord *Redesdale*, above noticed.

Then with regard to the circumstances of the case, since the issuing the commission. It must be remembered, that this is not a proceeding of course, but (as represented in the register,) "*de speciali gratiâ*" (*a*), that it is granted as a remedial process—and that it is consequently the duty of the party, in whose favour it issues, to use it as it was intended (*b*). Then, how does the conduct of these plaintiffs tally with the duty imposed on them, who have not only not prosecuted the commission, but never even acquainted the judges delegate with their appointment?

We can find no precedent or authority, in point, where the Lord Chancellor has actually superseded a commission of this particular kind. But the instances

(*a*) Reg. Brev. 131.

(*b*) See the form of the writ, ante, p. 635. (note), by which it appears to be imperative on the party, not merely empowering him to make use of it at his discretion.

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to be met with of such a proceeding as the writ itself, are extremely rare; the only two cases we have been able to find of its occurrence being that referred to in the affidavit already mentioned, (as to which, see the preceding observations,) and a reported case of *Greene* v. *Cole* (*a*), so long ago as the 22d of *Charles* the Second, which went to the House of Lords. And it may surely be inferred, with perfect safety, that the principles upon which the Court acts in superseding other writs and commissions are applicable to this. In what respect can it be stated, that this commission differs from any other commissions issued under the great seal?—From a commission of bankrupt, for instance, which it was the practice of the Court to supersede for want of prosecution, long before the order (*b*), regulating the time for prosecuting the same? In *Kempland* v. *M'Auley* (*c*), which was a rule to shew cause why the defendant's execution for the costs founded on a judgment of nonsuit should not be set aside, because it was sued out after the plaintiff had served him with the allowance of a writ of error, the plaintiff's counsel said, the Court would not *presume* that a writ of error is brought for the purpose of delay; but, on the contrary, had always required a declaration of the party suing out the writ, that such was his object, before they permitted the other party to proceed in defiance of the writ; to which Lord *Kenyon*, C. J. observed, that, "in general, the rule is as the plaintiff "had stated it; that a writ of error allowed and served "operates as a surpersedeas to an execution, and the "Court will stay the proceedings of course; but that "is on the supposition, that the party may have some

(*a*) 2 Saund. 228. 252.

(*b*) Lord *Loughborough's* Order, 26th of *June*, 1793. (2 Cooke's Bank. Laws, 285, 5th edit.)

(*c*) 4 T. R. 436

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"error to complain of in the judgment, which it is "right should be examined into, before execution is "awarded. And, therefore, if it appear clearly and "unequivocally to the Court, that the writ of error "is brought merely for delay, that reason does not "hold;" *Buller* J. adding, that "how that is to be made "out, is matter of evidence in such case. In general, "the Court require it to be proved by an acknowledg-"ment from the party who sues out the writ of error; "and they have held that the *belief* of the other party, "that it is brought for delay, is not sufficient. But "*here it is apparent*, that there can be no error of "which the plaintiff can avail himself." (*a*) See also Viner. "*Supersedeas*," C. 16. "If a writ of error is brought, and the day of the return is long, in order to delay the party, the Court may award execution." (*b*) Com. Dig. "*Pleader*," 3 B. 12. "If a writ of error "is returnable in B. R. or Exchequer, after the next "term, or on the last return of the next term," &c., "it shall not be a *supersedeas*, for it seems an affected "delay." (*c*) So, where delay is occasioned by the act of the party abating the writ, execution shall go, without giving time to bring a writ of error *coram vobis*. *Jenkins* v. *Bates* (*d*), *Birch* v. *Triste*. (*e*)

But, if it should be thought that there is not sufficient ground to supersede this commission and writ, then what we ask is that we may be at liberty to sue out execution in the mean time, notwithstanding. And the propriety of this application depends on the question,

(*a*) See *Hawkins* v. *Snuggs*, 2 M. & S. 476. Willes, 271. and *Miller* v. *Newbald*, 1 East, 662.

(*b*) Referring to 1 Keb. 109. Sid. 45, &c.

(*c*) Referring to 1 Vent. 266. 1 Sid. 45. 454.

(*d*) 2 Stra. 1015.

(*e*) 8 East, 412.

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whether or not the writ which has issued amounts to a *cesset executio?* Now, it is not *every* writ of error that does amount to a *cesset executio*. As Lord *Ellenborough* C. J., in the case already mentioned, of *Birch* v. *Triste*, says, (referring to *Carthew*, 368, 369.) "A writ of error *coram vobis* is not a *supersedeas* in itself"—although, he adds, that "execution cannot be taken out "on the judgment, whilst it is depending, *without leave of the Court*." (*a*) Now, it is this leave of the Court that we ask, and which we contend, under the circumstances, ought to be granted. This is the same thing, as to the application of the rule, as the "*coram vobis*"—because neither does this writ effect any actual removal of the record, empowering the justices therein named, or any two of them, to examine and correct the record, &c., "*at the* Guildhall *of the said city*," and, if error shall be found, &c., "the same to correct and amend, and to do full and speedy justice to the parties, *according to the custom of the said city*." (*b*) It is upon the same principle that an appeal does not operate as a stay of proceedings in the Court of Chancery.

Another ground for arguing that this writ does not, *per se*, amount to a stay of execution, is, that a special writ of *supersedeas* is provided for this purpose. (*c*) And, if it was thought necessary to provide this special

(*a*) 8 East, 416. See Bro. Ab. "*Error*," p. 66., where the reason why, after a writ of error is sued and allowed, execution cannot be awarded, is stated to be— "Car, per le briefe d'error, le recorde mesme est remove, et doncques le Court n'ad vien *unde* d'agarde execution." 7 H. 6. 42. To the writ *coram vobis* this reason does not apply, because that writ does not effect an actual removal of the record.

(*b*) See the form of the writ, ante, p. 635. note.

(*c*) Reg. Brev. 129. Fitz. N. B. 53.

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writ, it is manifest that the writ of error, *per se*, was not held to amount to it.

Again, look at the writ itself; and we shall find that the sheriffs are not thereby enjoined to stay execution unconditionally, but only "if any error," &c.— "to do and perform what shall be ordered by our said justices to be done." (*a*) From all which it follows that there is no actual *supersedeas*. And, if so, we should be entitled, of course, to the writ "*De executione judicii* (*b*)," which we have applied for, but have been refused it on the ground that execution *is* stayed by these proceedings, which compels us to ask for the judgment of the Court on the point above submitted to it. As to the defendant's strict right to the writ last mentioned, provided the law be with him on that point, see *Wilkins* v. *Mitchell.* (*c*)

But, supposing the contrary of what is here contended, and that these proceedings do, in fact, amount to a *supersedeas*, still it is a question whether the Court will not exercise its discretion, under the circumstances of the case, to award execution. The case of *Kempland* v. *M^c Aulcy* went upon the circumstances, and the principle of the cases referred to in *Viner* and *Comyns*,—of *Jenkins* v. *Bates*, and *Eirch* v. *Triste*, is the same, *viz.* that the Court will act upon the circumstances of the case, and the conduct of the parties, as affording a presumption that delay, and delay only, was contemplated

(*a*) See note, ante, p. 635.

(*b*) Fitz. N. B. 43.

(*c*) 3 Salk. 229. "In an action of debt for rent, brought in an inferior court, the plaintiff was nonsuit, whereupon the defendants had judgment; but they refusing to execute it, B. R. was moved for a *mandamus*, but it was denied, because the defendant had a legal remedy, (*viz.*) by the writ *de executione judicii* out of Chancery.

1 in

in issuing the proceedings — a delay, which, in the present case, is solely at the party's own will and pleasure, and not arising out of a single cause or motive independent of his arbitrary discretion.

Leach and *Bell* were heard in opposition to the motion (*a*); when by the former it was represented, that it is essential to a writ of error, that it virtually removes the record out of the court in which the proceedings were originally had, to the higher jurisdiction; the record itself being to be produced, which it cannot be without removal; that it is otherwise in an appeal from the Court of Chancery, where there is no removal or production of the record; but it is incumbent on the party appealing to put the court of appellant jurisdiction in possession of the circumstances of the case; and, for that reason, an appeal does not operate to stay proceedings, which must be the case where the record itself is removed. That delay is not a ground for quashing the writ, unless the delay is made the subject of a formal protest, and regular proceedings founded thereon; as, who ever heard of a writ of error being *ipso facto* nonprossed, upon the ground that no proceedings have been had in it? And the principle of this Court must be the same as of a court of law, where the party endeavouring to set aside the writ, must first obtain an eight-day rule for the purpose; at the expiration of which, if no proceedings are had, he is entitled to the writ *de executione judicii*. That no argument can fairly be drawn from the existence of such cases as *Kempland* v. *Macauley*, which are in themselves anomalous, and not to be brought forward as precedents or authorities for any that are not precisely the same in circumstances. Be-

(*a*) The reporter heard only a part of the argument on this side of the question, and that (owing to accidental circumstances) very imperfectly.

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sides, suppose the *writ* were to be superseded upon the authority of such cases, or of the reasoning adopted by way of inference from them, how is that to be made to apply to the case of a commission? That with regard to the alleged errors in the writ, and in the proceedings upon which that and the commission issued, the mere object of the writ being to remove the record out of the court below, those errors could be of no consequence, provided the snbject matter were sufficiently ascertained. As, how could it be in the least material, whether the party had been summoned or not, since it is sufficiently manifest, that he appeared? And if it were, what proof is there that he was not summoned in fact? If, by the custom of the city, some peculiar form of summons be necessary in a case where the party is abroad, how can his absence afford a ground for the suppression of the writ, *quia improvidè emanavit?* If the party falsely suggest circumstances, as entitling him to the remedy he seeks, he imposes on the Court, and falls within the direct reason of the rule. But how can it be pretended that the mistakes here complained of are such as at all affect the right of the party? Suppose it is irregular in form, there was no corrupt motive; the party meant fairly, and this Court will never supersede its proceedings, upon a mere defect of form, without protecting the party against the consequences which have been incurred without any fault or design whatever. Then as to the representation that the demurrer was to the plea only, no injury could be done to the defendant by the accidental suppression of the fact of the demurrer being to the replication also.

[*The* LORD CHANCELLOR here asked, Suppose the plaintiff had, upon getting the writ, acted upon it immediately, before the verdict had been pronounced, what would have been the consequence?]

Leach.

Leach. The effect would have been to stay proceedings.

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[*The* LORD CHANCELLOR.

Suppose the case of an action at law, that issue were taken as to part, and a demurrer to the remainder; and that after the demurrer had been argued, and judgment given against the defendant, but before trial of the issue, the defendant had taken out a writ of error; that the issue were then tried, and a verdict also had against the defendant; could the defendant have proceeded upon his writ of error in the first place, with respect to the demurrer, and complained that the judgment was wrong in point of law, and then come again upon the same writ of error, and complained, as against the verdict, that the declaration was defective in point of form?]

No answer was given to this question; and, on the following day (*a*), Mr. *Bell* having finished the argument for the plaintiffs, and Sir *Samuel Romilly* having replied, his Lordship said, he did not see how it was possible to support this commission and writ of error; and then repeated to the *Solicitor-General* the same question as he had put the day before to Mr. *Leach*; asking whether he thought such a writ as that he had mentioned could be maintained? to which the Solicitor-General replied, "Certainly not." Upon this, the counsel for the plaintiffs admitted that the objection was fatal, and *The Lord Chancellor* ordered both the writ and the commission to be superseded, with costs.

Reg. Lib. 1817. B. fo. 142.

(*a*) *Ex relatione.*

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Dec. 18. 24.

ANDREW SCOTT, GEORGE ARBUTHNOT, and PETER CHERRY; WILLIAM HARRINGTON, HENRY BURNABY, and H. H. HARRINGTON, - Plaintiffs.

AND

JOSEPH DUPRE PORCHER, and Others, Partners under the Firm of Messrs. PORCHER and Co. Defendants.

H. and Co., of *Madras*, make a consignment of pearls to *B.*, with directions to sell and pay the proceeds to *P.* (to whom *H.* and Co. were at the time indebted) on account. *P.* acknowledges the receipt of the consignment, and undertakes to perform these directions; but no notice is given by either party to *P.* *H.* and Co. subsequently write to *B.*, requesting the pearls to be sent to *America*, and there disposed of; and afterwards, being insolvent, make an assignment of all their effects in trust for the benefit of their creditors. Held that the directions accompanying the consignment did not constitute an appropriation, but amounted to no more than a mere mandate, revocable at the pleasure of the consignor; and which was actually revoked by the subsequent disposition of the property; and that *P.*, who had no express notice of the consignment, but, on receiving information of it after he knew of the failure of *H.* and Co., had laid an attachment on the pearls in the hands of *B.*, on which he had proceeded to judgment, and actually sold the pearls under it; having also executed the trust-deed as a creditor; was bound to account with the trustees for the proceeds.

The bill stated, that the plaintiffs *Harrington*, *Burnaby*, and *Harrington*, who were in partnership as general agents at *Madras*, under the firm of *Harrington* and Co., becoming indebted to an amount beyond what their estate was sufficient to pay, agreed to make an assignment of their stock in trade, and all their effects, both in their partnership and individual characters, to *James Strange* (then of *Madras*), and to the plaintiffs *Scott* and *Arbuthnot*, in trust for their creditors; and that, accordingly, by indenture dated the 19th of *December*, 1811, between the plaintiffs

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Harrington and Co., of the first part; the said *James Strange*, and the plaintiffs *Scott* and *Arbuthnot*, of the second part; and the several persons therein mentioned, (creditors of *Harrington* and Co.) of the third part; it was witnessed that, in pursuance of the said agreement, &c., the plaintiffs *Harrington* and Co. assigned to the said parties of the second part, all, &c. (subject to such claims, rights, or interests, as any other person or persons might have therein,) upon trust to sell and dispose of the same, and, out of the produce, in the first place, to retain to themselves all costs and expenses, and then (as soon as sufficient funds should be realized), to make and declare a dividend of 10 *per cent.*, to and among the subscribing creditors, upon the amount of their debts, and afterwards to proceed in paying off the several debts then due, when sufficient should come to hand to enable them to make or declare a dividend of 5 *per cent.*; and to pay the surplus to the plaintiffs *Harrington* and Co.; in consideration whereof, the subscribing creditors released to the said plaintiffs all actions, &c. In which indenture was also contained a power enabling the creditors, or a majority, to nominate or appoint either or any of the plaintiffs to act as trustees or trustee conjointly with the said parties of the second part, and to appoint new trustees, &c., in virtue of which power the plaintiffs *William Harrington* and *Burnaby* were, shortly after the execution of the indenture, appointed to act as such trustees jointly with *Strange*, *Scott*, and *Arbuthnot;* and, *Strange* having declined to act, the plaintiff *Cherry* was substituted as a trustee in his room.

The bill proceeded to state, that previous to the execution of this indenture, (in the month of *January*, 1810,) the plaintiffs *Harrington* and Co. consigned to Messrs. *Burnie*, in *London*, two boxes of pearls, one

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"on account of *Harrington* and Co.," the other "on account of (the plaintiff) *William Harrington*" only; and that, at the time this consignment was made, directions were sent by *Harrington* and Co., and also by *W. Harrington*, to Messrs. *Burnie*, to sell both the boxes of pearls so consigned, and pay the proceeds to arise from the sale of the first of the boxes to the defendants *Porcher* and Co., on account of *Harrington* and Co., and the proceeds to arise from the sale of the other box to one *Moffatt*, on account of *W. Harrington*. That the pearls arrived in safety; and Messrs. *Burnie* acknowledged the receipt of them by letters, dated the 12th of *July*, 1810, and addressed to Messrs. *Harrington* and Co. and *W. Harrington*, respectively, whereby they also undertook to pay the proceeds according to the directions so transmitted to them. That, at the time the consignments arrived, the market for pearls in *England* was much depressed; and Messrs. *Harrington* and Co. having been made acquainted therewith by Messrs. *Burnie*, formed the design of consigning the same pearls to *America*; in consequence whereof they, on the 6th of *January*, 1811, wrote to Messrs. *Burnie* the following letter:

"Dear Sirs,

"In consequence of the very unfavourable report re-"ceived from you of the state of the *London* market "for the pearls consigned to you by the *Surry*, as well "as the unpromising prospect of any improvement to "our advantage, it has occurred to us to desire inqui-"ries to be made of the probable vend in *America*. "You will receive from Messrs. *Higginson* and Co., "of *Boston*, a particular statement of the markets with "them, having furnished them with copies of the in-"voices, for the purpose of aiding their inquiries; and, "should it appear on a view of circumstances, at the "same time taking into consideration the drawback on

"the export of the pearls on the one hand, and the "charges of shipment, &c. on the other, that the result "which may be held out by Messrs. *Higginson* and Co. "of a sale in the *United States* will be comparatively "favourable, we request you will ship them accordingly "to their consignment on our account, covering all "risks, and advising us thereof by the first opportunity. "We shall allow of your charging your 2½ *per cent.* "commission, the same as if you had made the sale, in "compensation for your trouble on the occasion. We "apprehend the advantage of a prompt sale in *America*, "which is an additional motive. You will be pleased "to consider these instructions as including the con-"signment per *Surry* on account of our *William Har-"rington*, as well as of ourselves."

The bill further stated that, before the pearls could be sent to *America*, Messrs. *Porcher* and Co. received information of the failure of Messrs. *Harrington* and Co., and thereupon caused an attachment to issue out of the Lord Mayor's Court, whereby the pearls were attached, as goods in the hands of Messrs. *Burnie*, belonging to the house of *Harrington* and Co., and to the plaintiff *W. Harrington*, who were (as was alleged) respectively indebted to *Porcher* and Co.; that about the 20th of *February*, 1812, the plaintiffs (trustees) sent a copy of the indenture to *Porcher* and Co., and requested them to act as their agents in *London* for collecting all sums due to the estate of *Harrington* and Co., procuring the signature of creditors, and making payment among them of such monies as should come to their hands. The bill also stated, that at the time of the execution of the indenture, *Harrington* and Co. were largely indebted to *Porcher* and Co., and that *Porcher* and Co., upon receiving the indenture, executed the same as creditors, thereby (as the plaintiffs insisted) subjecting themselves

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to all the provisions thereof; that, in answer to the application made to them for that purpose, *Porcher* and Co. at first declined the agency, except upon the terms, that their acceptance of it should not prejudice their interest or affect the benefit they might, under the laws of *England*, be entitled to, either by virtue of their attachment, or from the possession of goods, bills, or other property of *Harrington* and Co. in their hands, or from any future legitimate means that might be presented for their security, and reimbursement of such debts as were due to them. That, afterwards, on the 10th of *August*, 1812, they (*Porcher* and Co.) wrote to the plaintiffs (trustees) stating, that they perceived that the terms of the deed not only excluded them from appropriating to themselves any property of *Harrington* and Co., that might thereafter come to their hands, but also from the benefit of their attachment; admitting, however, the equity of the arrangement thereby made, and engaging to apply whatever should be realized from the produce of the general funds, for the benefit of all the creditors, parties to the deed. That, notwithstanding, subsequently to their execution of the deed, they (*Porcher* and Co.) proceeded on their attachment, and obtained judgment therein, and by virtue thereof got possession of the pearls, and had since sold the same, and applied the produce in discharge of the debts due to them from *Harrington* and Co., without bringing any part to account with the plaintiffs (trustees). The bill then proceeded to charge them (*Porcher* and Co.) with notice, at the time when they executed the deed, and accepted the agency, or (at least) when they received the pearls, or the produce thereof, of the consignment to *Burnie* and Co., with directions to pay to them (the defendants); but insisted, that any directions which were given, with respect to the appropriation of such produce, were revoked by the subsequent directions contained in the letter

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letter of the 6th of *January*, 1811; and that, in case they were not so revoked, yet, as they had not been carried into execution at the time of the failure of Messrs. *Harrington* and Co., and the pearls had not been then sold, they (the pearls) ought to be considered as part of the estate of *Harrington* and Co., and to have been vested by the trust-deed in the plaintiffs (trustees) for the benefit of the creditors. The bill, therefore, prayed an account of the pearls, and of the money arising from the sale thereof, which had come to the hands of the defendants, or any of them, and that they (the defendants) might be decreed to pay to the plaintiffs (trustees) what should be found due on the taking of the account, in order that the same may be applied according to the provisions of the trust-deed.

The defendants, by their answer, admitted, that they received information of the failure of Messrs. *Harrington* and Co.: but whether before the pearls could be sent to *America* they could not say. They believed, however, that the news did not reach *England* till many months after the instructions had been received by *Burnie* and Co. to send the pearls eventually to *America*. They also admitted, that they caused the attachment to issue after they knew of the failure. They stated, that, at the time of the execution of the indenture, *Harrington* and Co. were indebted to them (the defendants) in 60,000*l.* They denied that they executed the indenture as creditors, admitting that they at first declined the agency, and stating, that, at the time when they wrote to Messrs. *Harrington* and Co., as mentioned in the bill, they had not adverted to the clause in the deed, whereby any creditor executing the indenture would be prevented from proceeding at law; and that, upon discovery thereof, they determined to sign, and waive the benefit of their attachment; and wrote to Messrs. *Harrington*

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rington and Co., apprizing them of that determination, and that they would prosecute the attachment for the benefit of their estate. But they farther stated, that they had since been informed of the pearls having been consigned to *Burnie* and Co., to be sold, and the proceeds paid to them (the defendants) in part payment of their debts; and, admitting that they had proceeded in the attachment, and obtained judgment thereon, by virtue whereof they had possessed the pearls, which they had since sold for 8000*l.* and upwards, they insisted on their right to retain and apply the same in discharge of their own debt, so far as it would extend, by virtue of such consignment.

It appeared, both by the answer and evidence in the cause, that the defendants did not know of the first-intended appropriation, under which they claimed, till after they had executed the indenture, and also had obtained judgment, and recovered the pearls under the attachment.

Bell, *Dowdeswell*, and *Abercrombie*, for the plaintiffs,

Stated the principal question to be, whether the original consignment amounted to a specific appropriation of the pearls in favour of the defendants; and they argued that, to render such an appropriation valid, there must be three concurrent circumstances: First, a specific direction from the consignors so to apply the produce; secondly, acceptance of the commission on the part of the consignees; and, lastly, the assent of the party for whose benefit it is intended, to the appropriation. Suppose the third requisite wanting, and that, without any communication to Messrs. *Porcher* and Co. of the consignment and accompanying directions, Messrs. *Burnie* and Co. had sold the pearls, and afterwards been robbed of the produce; would that have been

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been a discharge of the debt due from *Harrington* and Co. to the defendants? This was no more than one merchant sending goods to another, directing him to sell, and pay the money in at his banker's. No lien attaches, unless there is an effectual binding contract between all the three, the consignor, the consignee, and the party to whose use the consignment is appropriated. And they cited *Williams* v. *Everett* (a), and *Wilkins* v. *Savage*. (b)

[His Honour having asked how this question came into a court of equity, seeing it was the proper subject of an action at law, as money had and received to the use of the plaintiffs; *Bell* answered, that it was clearly a matter of account, as between principal and agents, factors and brokers; where no specific sum can be demanded but the balance, after deducting brokerage, &c. That, besides, no objection on that ground was taken by the answer: but, if it were raised, it was conceived, that a person in the situation of an agent (as *Porcher* and Co. had constituted themselves) could no more sustain such an objection than the factor or broker himself (Messrs. *Burnie* and Co.) might have done. That it is well settled, that a court of equity does not lose its jurisdiction, because an action for money had and received may lie, but in such cases exercises a concurrent jurisdiction with the court of law; and that, in the present case, the question was brought before this Court by consent; in the way of an amicable suit, for the purpose of determining the question.]

Sir S. *Romilly* and *Shadwell*, for the defendants.

First. Here is a consignment for a specific purpose, and an acceptance on the part of the consignees. The

(a) 14 East, 582. (b) 2 B. & P. 459.

 communication

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communication to the third party is not essential to the appropriation. There are cases, in which the party to whom the consignment or remittance is made, has refused to accept the commission in terms; and the question has been, whether the party was duly constituted a trustee in respect of the property; for otherwise it is admitted, that there could be no appropriation. That was the case of *Williams* v. *Everett*; where, although the plaintiff had received a letter from the remitter of the bills, ordering payment of his debt out of the remittance, yet the defendants, (who were the bankers of the remitters) having refused to indorse the bill away, or otherwise to act upon the instructions they had received from him, it was held, that they (the defendants) did not, by the mere act of receiving the bills, and afterwards the produce of them, bind themselves to apply the money in discharge of the plaintiff's debt, according to the directions; and that the property in the bills, and their produce, still continued in the remitter. The circumstance of the third party (the plaintiff) having, or not having, notice of the intended application, therefore, formed no part of the principle which decided that case; and accordingly Lord *Ellenborough* says, "The case of *De Bernales* v. "*Fuller* (*a*), which has been urged in argument on the "part of the plaintiff, is clearly distinguishable, by this "circumstance; that the defendants in that case had "antecedently received the bill, which was to be paid "at their house from *Newnham* and Co., the bankers of "*De Bernales*, the holder, for the very purpose of receiving payment for them (the *Newnhams*) of such "bill; and having taken the bill for this purpose, the "Court thought that the defendants (*Fuller* and Co.) "could not, by themselves or their clerk, renounce

(*a*) 14 East, 590. note; and 2 Campb. 426.

"this

"this purpose: but must apply the money brought by "*Fuller*'s clerk specifically for the discharge of that bill, "then lying at their house, to that very purpose and "no other; and that they were in effect to be regarded "in that case as the plaintiff's agents, through the in-"tervention of *Newnham*'s house, for the purpose of "that receipt; and could therefore hold and apply it "to no other. *Here* no agency for the plaintiff ever "commenced; but was repudiated by the defendants in "the first instance." (*a*)

In the present case there is no question whatever that Messrs. *Burnie* and Co. were duly constituted trustees; and the question whether the consignors might not subsequently revoke their commission does not arise. There were no express directions to send the pearls to *America* contained in the letter of *Harrington* and Co. to the consignees, dated the 6th of *January*, 1811; which letter amounts to no more than the declaration of a conception, on the part of the consignors, that they had a right to apply the consignment to some other purpose than that originally intended. But it never was, in fact, so applied; and therefore their change of intention (if there were any) is nothing to the purpose.

The next question is, whether any thing had been done by the defendants (*Porcher* and Co.) to preclude them from availing themselves of the consignment made in their favour. Whatever was done by them, it is said, was done in total ignorance of their interest; and it is, therefore, impossible that such a question can at all be argued. If any loss had been incurred, it certainly would not have been the loss of *Porcher* and Co., until

(*a*) 14 East, 598.

they

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they had notice. But the same must be the case with every assignment made for the benefit of creditors.

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And yet the answer to that very question is the criterion by which to determine whether an appropriation was finally made or not.]

Shadwell, for the defendants.

A material difference between the case of *Williams* v. *Everett* and the present has already been stated to consist in the refusal of the bankers, in that case, to apply the produce of the bill according to the directions of the remitter; that is, to take upon themselves the trust intended to be reposed in them. The decision of *De Bernales* v. *Fuller* is in favour of these defendants; for it establishes the position, that, where money is put into the hands of any person for a given purpose, which purpose is for the benefit of another, unless he expressly repudiates the commission, he becomes a trustee for that other person. *Burnie* and Co. were not at liberty subsequently to repudiate, having become trustees by their acceptance of the commission. Then how can a trust, so created, be destroyed? It cannot be said that *Porcher* and Co., by any act of their own, have done it, any more than those parties who have actually filed this bill for relief. But the party remitting seeks to have restitution; and, for that purpose, would fix upon the plaintiffs (who are merely trustees) the consequences of his own error. In *Williams* v. *Everett*, the *cestui que trust* of the remittance brought his action against the party to whom the remittance was made. Here, Messrs. *Harrington* and Co., through the trustees named in a deed of their own creation, seek to disturb a trust which they also had previously constituted. Can it be said that they are now at liberty to act in this manner? But *Williams*

Williams v. *Everett* has really nothing at all to do with this case; there having been here a specific direction to apply the consignment, and an acceptance of the commission.

Then it is said, there must be notice to the third party of the benefit intended him. But where is it to be found that such notice must be either immediate or simultaneous? It is only laid down, in general terms, that there must be notice; and, in point of fact, there *was* notice to Messrs. *Porcher* and Co., and acceptance by them.

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It may be said, that the notice ought to have preceded the assignment in trust for creditors.]

Bell replied.

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Dec. 24.

This case is stripped of almost every circumstance that has ever been relied upon as constituting an irrevocable appropriation. *Harrington* and Co., who made the consignment, never informed *Porcher* and Co. that any remittance was made, or intended to be made, on account of the debt due to the latter. The consignees, who were mere factors for the consignors, had no directions to apply the produce of the consignment in payment of any specific debt, or in taking up any particular bill of exchange. The only order they received was, that when the sale should be effected, they should pay over the proceeds to *Porcher* and Co. They informed their principals that they would act in conformity to the directions received: but they had no communication whatever

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ever with *Porcher* and Co. on the subject. This amounts to no more than a mandate from a principal to his agent, which can give no right or interest to a third person in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit. And it will be revoked by any disposition of the property inconsistent with the execution of it.

The assignment of it in *December*, 1811, was such a disposition. Under that assignment the general creditors of *Harrington* and Co. became entitled to the benefit of every description of property over which they had a disposing power. There was no third person who had then acquired any interest, legal or equitable, in the goods in question; and therefore *Harrington* and Co. could dispose of them, and they have disposed of them to the present plaintiffs, who are consequently entitled to a decree.

Decree in favour of the plaintiffs.

Reg. Lib. 1817. B. fo. 702.

N. B. Immediately after his Honour had delivered the above judgment, which terminated the sittings of the Court after *Michaelmas* term, Sir *Arthur Piggott* rose, and made the address, which is printed at the end of the Second Volume of these Reports; to which his Honour made the answer there also mentioned, taking his leave of the bar on his retirement from office.

APPENDIX,

CONTAINING

SOME NOTES OF CASES

DECIDED

BEFORE THE PERIOD AT WHICH THESE REPORTS COMMENCE,

AND NOT COMPRISED

IN ANY OF THE CONTEMPORARY REPORTS.

N. B. *Most of the following Notes were communicated by different professional Friends, and have been compared (wherever it was practicable) with the Register's Books, to which References are made.*

Appendix.

;ARLETON *v.* SIR WILLIAM LEIGHTON. (*a*)

1805.

Plea of bankruptcy to a bill by heir at law against devisee; over-ruled as bad in point of form, not averring distinctly, and in succession, the facts upon which the bankruptcy rested.

Not sufficient, for the purpose of such a plea, to state that the plaintiff was duly found a bankrupt under the commission.

Expectancy of an heir either presumptive or apparent, not an interest or possibility capable of being made the subject of contract.

Estate descended after the bargain and sale of the commissioners, and before certificate, is the property of the bankrupt, and does not vest in the assignees, except by a subsequent assignment.

THE plaintiff by his bill claimed certain real estates in the defendant's possession, to which he plaintiff alleged himself entitled as heir at law; and the case was, that the plaintiff's alleged an-'estors, by their respective wills, dated respectively n 1794 and 1796, had devised to Sir *William Leighton.* But, as to the will of 1794, it was void at aw, which let in the plaintiff; and as to that of 1796, there was, with regard to it, such an influence by he defendant over the testatrix, as would raise in :quity a trust in the defendant (as devisee) for the plaintiff (as heir at law). The bill therefore charged raud, &c.

To this the defendant put in a plea in bar, stating that the plaintiff had no right or interest in the estates in question: for that, in 1792 or 1793, before the date of either of the wills, a commission of bankruptcy was duly issued against the plaintiff, under which he was afterwards duly found and declared a bankrupt, and all his estate and effects were thereupon duly transferred and assigned to *John Jackson* of, &c.

(*a*) This case, which was communicated to me by Mr. *Hodgson*, is referred to by Mr. *Beames* in his "Elements of Pleas in Equity," p. 118, 119, 120.

This

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This plea was set down by the plaintiff, and now came on to be argued.

In the course of the argument it was further stated, that the plaintiff obtained his certificate in 1803, and had paid every creditor the full amount of his debt.

Fonblanque and *Cullen* for the plea.

The interest or possibility of an heir at law in the property expected from his ancestors may be made the subject of contract. *Beckley* v. *Newland* (*a*), *Hobson* v. *Trevor*. (*b*) It is a possibility which, if not assignable at law, is nevertheless within the statute. (*c*) In the present case, therefore, the possibility which the plaintiff had as heir at law of the testatrixes passed by the bargain and sale of his commissioners leaving him (the plaintiff) without any right or interest whatever. But even if it did not so pass, but descended on the plaintiff, then it must be bound by a trust for the creditors, and ought to have been made the subject of a second bargain and sale; so that the beneficial interest must be in the assignees, and the plaintiff cannot be entitled in equity. In *Benfield* v. *Solomons* (*d*), a demurrer was allowed to a bill by a bankrupt, because it only charged collusion generally, and did not aver that there would be a surplus, or that there had been a specific application to the assignees to sue.

(*a*) 2 P. Wms. 182.

(*b*) 2 P. Wms. 191. See, as to the doctrine of these cases, Maddock's Princ. and Pract. of Chanc. Vol. I. p. 437., where, referring to a MS. case of *Harwood* v. *Tooke*, it is observed, that Lord *Eldon* has expressed a serious doubt with respect to it. And see post 671.

(*c*) 5 *Geo.* 2. c. 30. s. 1.

(*d*) 9 Ves. 77. And see *Saxton* v. *Davis*, 18 Ves. 72.

If

If the plea be thought informal, leave will be given the defendant to amend it.

Sir *Samuel Romilly* and *Owen* for the plaintiff.

The same strictness in pleading is required in equity as at law. "All the facts necessary to render the plea "a complete equitable bar to the case made by the bill "so far as the plea extends, that the plaintiff may take "issue upon it, must be clearly and distinctly averred." (*a*) Who ever heard of pleading bankruptcy, in the general language that this plea uses? Such a plea should state distinctly the trading, the contracting debts, the petitioning creditor's debt, the act of bankruptcy, the commission, the finding bankrupt, and the assignment; and if real estate is in the case, the bargain and sale should be clearly mentioned. Chancery pleading has been often stigmatized as too loose: this seems to be an experiment to carry it to the greatest possible laxity. If such a mode of statement were sufficient in a bill, it does not follow that it would be so in a plea: but it will not do even in a bill. It was some time before it was settled, that such an averment, even with an admission of the facts by the defendant's answer, would be sufficient. At law, it is clear, all the facts must be stated in a plea, although greater latitude is allowed in declarations; and, when a bankruptcy had gone so far as the granting of the certificate, the certificate could not be pleaded without stating every previous step, until the statute (*b*) enabled the bankrupt to plead his bankruptcy and certificate generally. Therefore, even supposing this property to have been liable to the commission, this plea is quite informal, and will not be allowed. Another thing is, that the

(*a*) Gilb. on Ch. 58. Mitf. 236. (*b*) 5 *Geo.* 2. c. 30. s. 7.

plea

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plea purports to be a plea in bar; now, if it were correct, it could be only a plea in abatement, therefore, permitting the defendant to amend his plea, will be to allow him to substitute a plea in abatement for a plea in bar, which is never suffered. But if it were a mere plea for deficiency of parties (*a*), or if such a suggestion had been made in the answer, the plaintiff would reply to it, by shewing that, having paid every creditor 20*s*. in the pound, he is absolutely entitled to the estate, and that the assignees have no interest at law or in equity. The proposition, that this property passed by the first assignment, is too extravagant to be supported; in answer to it, it may be sufficient to refer to *Moth* v. *Frome*. (*b*).

[*The* LORD CHANCELLOR, in the course of the plaintiff's argument, said that the informality of the plea was manifest; for that it only stated that a commission duly issued, which might be the case though the party were no bankrupt.]

Fonblanque, in reply. The plea, in substance, being correct, it would be mere superfluity to state what was not substantial; and the objection, that it only states that the commission duly issued, is obviated by the averment, that the party was duly found and declared a bankrupt,—such general pleas are not uncommon at law. With regard to the matter pleaded, it seemed not so extravagant, having been much discussed in the cases cited, and the words which conclude the report of the case in *Ambler*, *viz*, "that it must be a possibility that can be *assigned or released*," coupled with the cases in *Peere Williams*, and that of *Jones* v. *Roe* (*c*), appeared to

(*a*) The assignees not being before the Court.

(*b*) Amb. 394.

(*c*) 3 T. R. 88. 94, 95. 1 H. B. 30.

warrant

warrant the opinion that the estate descended passed by the first assignment as a possibility vested in the bankrupt that could be "assigned or released." The plea does not seek to avoid the justice of the case; all the defendant asks is, that he may not be obliged to account with one, who, having no right or interest, is incapable of giving him a proper release.

The LORD CHANCELLOR

Decided that the plea must be over-ruled. That it was bad in point of form, as it was clearly contrary to all practice to plead bankruptcy without stating all the facts successively and distinctly; that to admit such a mode of pleading by general language would be very inconvenient; for that, although in the present case the party opposed to the plea being the alleged bankrupt himself, the several facts would be within his knowledge if issue were joined, yet such a plea used against third persons unacquainted with the facts would be attended with great and unnecessary trouble; that it was no defence to say that the averment that the plaintiff was duly found a bankrupt would supply any preceding defect; that a man may be duly declared a bankrupt (that is, according to the evidence before the commissioners) and yet not be so; for that the assignees are obliged, at law, to submit the whole facts to the jury, the first time they have occasion to try any question; and that jury may decide that the party was not a bankrupt.

That the expectancy of an heir presumptive or apparent (the fee-simple being in the ancestor) was not an interest, or a possibility, nor was capable of being made the subject of assignment or contract (*a*); that the cases cited were cases of covenant to settle or assign property

(*a*) See ante, 668, note (*b*).

which

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which should fall to the covenantor; where the interest which passed by the covenant was not an interest in the land, but a right under the contract (*a*); therefore, that no interest in the estates in question passed under the bargain and sale of the commissioners.

That, as to the argument that the beneficial interest would nevertheless be in the assignees (the property having descended during the bankruptcy,) all property was at law in the bankrupt till duly and legally conveyed to the assignees; that it frequently happened that the creditors, being contented with what they had got, and satisfied with the bankrupt's conduct, did not call for any second assignment; that this applied most particularly where the bankrupt, as in the present case, had paid 20*s*. in the pound; and that, until the creditors chose to take the benefit of the property, it remained in the bankrupt both at law and in equity. Lastly, that the matter of the plea being such, it would be fruitless to allow it to be amended.

The plea was over-ruled accordingly.

(*a*) It seems that a covenant to settle estates, which should afterwards fall or descend to the covenantor, is only personal during his life, and can never attach on the estate which is the subject of it directly, and, circuitously, only as a part of the covenantor's real estate, if the word "Heirs" be in the covenant.

Qu. Might not the argument in this case have been put thus? "The plaintiff "could not claim a right to, "or interest in, these estates, "otherwise than as the heir "of the two ladies at the "time of the bankruptcy and "assignment. But he could "not claim as heir; for he "could not stand in that ca- "pacity; because *nemo est* "*hæres viventis*. Therefore, "at the time of the bank- "ruptcy and assignment, he "could claim no right or in- "terest whatever." J. H.

Appendix.



1807.
April 9.

RICHARDS *v.* NOBLE. (*a*)

Lord of a manor is entitled to injunction and account in respect of waste by a copyholder.

BILL by lord of a manor against copyholders, for an account of turves cut and taken, and for an injunction; not waiving the forfeiture.

Defendants put in a demurrer for want of equity.

Sir *S. Romilly*, *Hart*, and *Heald*, in support of the demurrer. There is only one case on the subject, which settles this point: that of *Dench* v. *Bampton*.(*b*) Copyholds are *strictissimi juris;* and a court of equity will leave the lord to his remedy at law for a forfeiture. (*c*)

Leach and *Bell*, for the plaintiff, impeached the authority of the case cited, arguing that it was a strange determination to say, that equity would not relieve, when the waste committed was such as amounted to forfeiture; and they cited the instance of a remainder-man in fee filing a bill against tenant for life, who had committed waste; it was never pretended that such a bill would not lie. They admitted that, without the prayer for an injunction, the plaintiff could not have an account. (*d*)

The LORD CHANCELLOR took time: but said that, in many cases, the forfeiture was a very inadequate remedy; and he noticed the instance of a barren spot upon which many valuable timber trees grow. If the

(*a*) Ex relatione Mr. *Simpkinson.*

(*b*) 4 Ves. 700.

(c) *Vide* Anon. Skin. 142.

(*d*) *Jesus College* v. *Bloome*, 3 Atk. 262.

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copyhold tenant only forfeited his copyhold by cutting down these trees, he might in such case be a considerable gainer by his own wrongful conduct.

The demurrer was over-ruled accordingly; and afterwards, upon affidavit in support of the principal facts alleged by the bill, the injunction was awarded. (*a*)

(*a*) 17th *August*, 1807. Reg. Lib. 1806. B. fo. 1224.

Rolls.
July 15, 1807.

BASEVI *v.* SERRA. (*a*)

Equity of a bankrupt's wife against the assignees of her husband or their vendee for a settlement of her *choses en action*.

Jewish settlement.

IN this cause there was a question between the wife of a bankrupt and a purchaser for valuable consideration from the assignees, as to the wife's equity to have a settlement out of a fund of 200*l.* a year, part of her choses en action; and it was stated to be the practice of the Jews on marriage, that the husband (they being for the most part in trade) *takes all the wife's fortune*, and gives his covenant to restore it with 50*l. per cent.* profit, and that was done in this case; the settlement was, that in consideration of 3000*l.* stock paid to him before the marriage, the husband, *J. M. Da Costa*, covenanted, that his executors, &c. would, within six months after his decease, replace to the wife that sum with 50*l. per cent.* profit; and so that if, during the marriage, the husband should receive or become entitled to any further sums of money in right of his wife, his ex-

(*a*) Communicated by Mr. *Hodgson*. See 14 Ves. 313., where the circumstances will be found more fully stated.

ecutors,

ecutors, &c., should, within six months, restore them with the like profit.

For the wife it was pressed that the purchaser from the assignees must stand liable to the wife's equity, in the same manner as the assignees, or the bankrupt himself, would have been liable; and the cases of *Bosvil* v. *Brander*, 1 P. Wms. 458. *Worrall* v. *Marlar*, and *Bushnan* v. *Pell*, ibid. 459. note; and 1 Cox 153.; and *Oswell* v. *Probert*, 2 Ves. jun. 682., were cited. (*a*)

For the purchaser it was insisted that, independently of his standing in the favoured character of a purchaser for a valuable consideration, without notice, he could not be liable, as the assignees had in fact received all the benefit. That he did not come to the Court for its aid (see *Bosvil* v. *Brander*, ubi sup.), but was brought there by the wife and the assignees; and that in point of fact the husband was a purchaser of his wife's fortune by the settlement.

The MASTER *of the* ROLLS.

Whatever may be the general equity of a wife against her husband's assignees, or purchasers from them, to have a settlement made out of her choses in action, where the husband is not a purchaser by settlement, and where he, or his assignees, or their vendee, come to the Court for its aid, the wife, in this case, can have no such equity, because she has ex-

(*a*) See also *Mitford* v. *Mitford*, 9 Ves. jun. 87. *Carr* v. *Taylor*, 10 Ves. jun. 578. *Wright* v. *Morley*, 11 Ves. jun. 12. *Beresford* v. *Hobson*, 1 Madd. 362.; where the cases are collected in a long and elaborate judgment of the present Master of the Rolls, then Vice-Chancellor.

 pressly

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pressly abandoned it; and by her settlement consented to rest upon her husband's covenant. Where there is no such covenant, or where such a covenant has been *actually broken*, the equity would no doubt attach: but here the covenant is not to be performed till after the husband's death, and he is living. As to the plea, that the husband in point of fact has not received or become entitled to this money, that cannot take the case out of the reasoning drawn from the settlement; for, suppose he should again become solvent, and the wife was to come to the Court for a settlement, he could not say then he never took this money. The answer would be, that his estate had the benefit of it, and it was his fault or his misfortune, that his bankruptcy carried to others what he would else have become entitled to.

Where several parties are entitled to share in a fund, and the shares of some are encumbered so as to render enquiries or other proceedings necessary with respect to them which are not wanted as to the others, the costs will be apportioned.

In the same case it was also said, that, where a fund is to be divided between several parties, and one or more of them, by charging their shares with mortgages, annuities, or other incumbrances, have contributed to swell the expense of the suit, the practice is to divide the fund in the first place, and direct the Master to calculate the costs of the suit, with reference to each share, and so to deduct them; in which mode of doing it, each party bears his own costs most equally; and so it was in *Mocatta* v. *Lousada* (*a*), which His Honour acknowledged, and said it was a good rule. (*b*)

(*a*) 12 Ves. 123.; where, however, the point is not noticed.

(*b*) Reg. Lib. 1806. A. 2. fo. 1147. b.

Appendix.

First Seal after *Hilary*, 1808.

COVENTRY *v.* BENTLEY. (*a*)

Defendant to a bill of discovery is entitled to the costs of the discovery immediately on putting in a full answer; and his right to these costs is not waived by his subsequently accepting the costs of an amendment, nor by his neglecting to serve the plaintiff with the order for costs of discovery until after he has himself been served with the order to amend.

BILL for discovery. Answer put in. Exceptions taken and allowed. Further answer referred back to the Master, who reports it sufficient. The defendant then obtains an order, on petition, for the costs of the discovery. The plaintiff afterwards moves for leave to amend, and is served with the order for costs, subsequently to his obtaining the order to amend. It appeared that the bill had, in fact, been amended; and that the defendant had accepted the usual costs of the amendments: but, whether before or after the order for payment of costs of the discovery was served on the plaintiff, did not appear.

Perry, for the plaintiff, moved to discharge the order for payment of costs of the discovery, for irregularity, upon the ground of the plaintiff's not having been served with it, till after he had served the defendant with the order to amend. He also insisted that the defendant had waived this order by accepting the costs of the amendment.

Richards, contrà.

After a full answer, the defendant has a right, of course, to the costs of his discovery. They attach immediately; and, consequently, they cannot be affected by his likewise receiving the costs of amendment. Suppose, after the discovery, the plaintiff alters the frame of his bill, and makes it a bill for relief; can it be contended that the defendant, by accepting the

(*a*) Ex relatione Mr. *Simpkinson*.

costs

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costs of amendment, has waived his right to those which he was entitled to for the discovery? (*a*)

The motion was refused accordingly.

(*a*) See *Butterworth* v. *Bailey*, 15 Ves. 348. After answer to a bill of discovery, motion to amend the bill by adding a prayer for relief, refused with costs. And, *vice versâ*, after answer to a bill for discovery and relief, motion to amend by striking out the prayer for relief, also refused. *Earl of Cholmondeley* v. *Lord Clinton*, 2 Ves. & B. 113.

In the Exchequer.
June 28, 1808.

On a bill for examining witnesses *in perpetuam rei memoriam*, held that publication of the depositions should not be allowed unless in a strong case.

HARRIS v. COTTERELL. (*a*)

THIS case arose on a rule to shew cause why publication of the depositions of witnesses, taken by commission in a suit for perpetuating testimony, should not pass, which, on the part of the plaintiff, it was contended was a matter of course. The plaintiff was devisee under a will, the defendant heir at law, and the defendant had failed in one ejectment brought by him, to set aside the will; but he had commenced a second action, which he now stated by affidavit he intended to try at the ensuing assizes. The plaintiff's bill was for a commission to examine witnesses to prove the due execution of the will, and the sanity of the testatrix, *in perpetuam rei memoriam;* and he laid the usual ground, that the defendant hung back, threatening, &c. but neither the bill nor answer noticed specifically the proceedings at law. The commission had issued, and under it all the witnesses examined on the former trial at law, and intended to be called in the second action, on both sides were examined.

(*a*) Ex relatione Mr. *Hodgson.*

Dauncey,

Dauncey, *Thompson*, and *Puller*, for the defendant, resisted publication, on the ground that this was a mere examination *de bene esse*, ancillary only to the suit at law, and therefore within the general rule, that the Court never allows publication, unless in the case of a witness dying or being incapable of attending to be examined in chief; and they cited *Fowler* (*a*), *Harrison* (*b*), *Practical Register* (*c*), *Duke of Dorset* v. *Girdler* (*d*), and *Cann* v. *Cann* (*e*), and they urged the great inconvenience and impropriety of allowing the depositions to be published, putting the defendant at law in possession of the plaintiff's mode of proceeding, &c., and insisted that no good end could be answered by allowing the publication.

The *Solicitor-General*, *Hollist*, and *Hall*, (for the plaintiff), contended, that this was not the case of an examination *de bene esse* in chief, being after issue joined; and that in this case, (as well as on bills for relief) the plaintiff might be allowed to examine *de bene esse* before issue joined, on shewing good cause for such examination; and they cited the 35th general rule of the court (*f*): *viz.* That in a suit for perfecting testimony the plaintiff may, after a certain delay in putting in the answer, have examination *de bene esse*; that as soon as issue is joined, there must be a second examination, and that, on the return of that commission, the depositions taken under it, together with those taken *de bene esse* of any witness who died before

(*a*) 2 Fowl. Exch. Pract. 147.

(*b*) Ed. Newl. 52. *et seq.*

(*c*) Wyatt's edit. 71, 72, 73.

(*d*) Pre. Cha. 531.

(*e*) 1 P. Wms. 567. And see Lord Bacon's Orders, 73, (Beames's Ord. in Chanc. 32. and the authorities referred to in note 116.)

(*f*) 1 Fowl. 52. where a part only of this general rule is referred to.

they

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they could be examined in chief, shall be forthwith published (*a*); and relied on the practice, insisting that publication of depositions, taken as these were, is a mere matter of course. As to the particular inconvenience, they put the case of a witness dying so near the time of the trial at law as to make it impossible to pray publication afterwards, and the case of a contract for sale of the estate, the purchaser objecting to complete it while the cloud hangs over the title, but willing to take it on seeing the depositions.

The Court seemed much disposed to refuse the application: but, as it was considered a new and important point of practice, it stood over, in order that further enquiry might be made.

GRAHAM B. took a material distinction. He said that great confusion had arisen (which was admitted on all sides) between three distinct objects; first, examinations *de bene esse;* secondly, examinations on a bill merely to prove a will *per testes;* and, thirdly, examinations of witnesses, on such a bill as the present, *in perpetuam rei memoriam*, which obtain on wills and deeds, on modusses, on legitimacy of marriage, &c. &c. As to the first, they are not published, but by consent, or on a strong case being made. As to the second, they stand on a distinct ground, because none but the subscribing witnesses are examined, and they are examined to the question of sanity, merely as incidental; and there publication is of course. But as to the third, he thought none of the cases or dicta applied to it, and that if publication had been usually allowed, it was *sub silentio*, and the question never discussed. That the danger of publishing such depositions as the present is

(*a*) The Court censured the inaccurate and confused manner in which this article is worded.

very

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very great, there being no limits as to the points to which the witnesses are to be examined: and therefore he thought that it is matter for discretion in the Court, to allow publication, or not, according to the case made.

On a subsequent day the case was again mentioned, and the Court refused the publication. *Macdonald* C. B. stated that precedents had been searched, and none found in point to support the publication; and that, on consulting the Lord Chancellor, he was of opinion it should be refused in this case; with which all the Court concurred.

HIBBERT *v.* HIBBERT. (*a*)

ROLLS. *Aug.* 5. 1808.

Testator directs "that *A.* be appointed receiver of his "real and personal estate," and dies seised of no real estate, except an estate in the *West Indies*, having by his will directed a sum of money to be invested in the purchase of lands in *England*.

A. appointed manager of the *West India* estate, upon entering into a personal recognizance to account for the produce.

TESTATOR devises his real and personal estate to four persons, upon certain trusts. He also appoints them his executors, and directs, that upon his death, they shall institute a suit in Chancery, for the purpose of carrying his will into effect, under the direction of the Court. By a codicil, dated a short time before his death, he directed that his friend, *Ambrose Humphreys*, should be appointed receiver of his real and personal estates, and expressed, in strong terms, his opinion of *Humphreys*, adding, that he made this appointment for the sake of benefiting *Humphreys* in a pecuniary point of view. He also directed, that *Humphreys* should be the solicitor for all parties in the cause in Chancery.

(*a*) Ex relatione Mr. *Simpkinson.*

(*b*) *Morris* v. *Elme*, 1 Ves. jun. 139.

The

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The only real estates which the testator died seised of were situated in *Jamaica;* though he directed 40,000*l.*, part of the residue of his personal estate, to be invested in the purchase of lands in *England*, to be settled to the same uses as his real estate in *Jamaica.*

Upon the testator's death, a suit was instituted in Chancery, in which *Humphreys* acted as solicitor for all parties.

March 30, 1808. The cause was set down by consent at the Rolls, when His Honour appointed *Humphreys* consignee of the *Jamaica* estates, and receiver of the personal estate directed to be invested in the purchase of real estates. He was not, however, ordered to give security; not even his personal recognizance. All the cestui que trusts were infants.

Two of the trustees afterwards brought a petition of re-hearing, by which they contended, that *Humphreys* ought not to have been appointed consignee, and that he ought to have given security like other receivers.

Sir *A. Piggott*, *Hart*, and *Cooke*, for the petition, contended, that it could not have been the testator's intention to have appointed *Humphreys* consignee. How can a solicitor be fit for such an office? A consignee is in fact the person who receives and sells the produce of the estate; who sends out supplies, &c. &c. In short, he ought to understand thoroughly the nature of the *West India* market. It must rather have been the intention, that he should receive the rents of the estates to be purchased in *England.* At all events he ought to have given security, at least his own personal recognizance.

Sir *Samuel Romilly* and *Wetherell* for *Humphreys.* It is quite clear, that the testator intended *Humphreys* should

should be consignee. The testator had no real estates, except those in *Jamaica*, therefore no other real estates to which this word can attach. What, in fact, is the difference between the terms receiver and consignee? None. The former, at least, necessarily includes the latter. Even if *Humphreys* is an unfit person, the testator has expressly appointed him. As to the point of security, there is no instance of the Court directing security to be given, where a receiver is appointed by the testator.

Sir *A. Piggott*, in reply. The testator was a *West India* planter. Is it probable that he would have applied the word receiver to these estates? This word is never used in the *West Indies*. If he had such an opinion of *Humphreys*, why not appoint him consignee during his life? He very properly employed *West India* merchants, who are clearly the proper persons.

The MASTER *of the* ROLLS. *Aug.* 5, 1808.

This argument would have considerable weight, if the testator had died seised of other real estates. I must either strike out these words, or admit the construction contended for by *Humphreys*. There is, indeed, no other sense in which these words "Receiver of my real estates," can attach. As to security, he need give none, except his personal recognizance; which ought to have been directed by the former decree, he not being appointed by the Court, but by the testator himself.

"Order, that the former decree, dated the 30th of *March* 1808, be varied, so far as the same directs that the appointment of *Ambrose Humphreys* to be receiver and agent of the real and personal estates of the testator, shall be without his entering into the usual recognizances, with sureties in like cases required by this Court; and, instead

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stead thereof, that such appointment be upon his entering into his own recognizance, to be approved of by the said Master, duly and annually to account for what he shall receive in respect of the said estates, as such receiver, agent, and consignee, and pay the same as this Court hath by the said decree directed, and shall hereafter direct; and, with the said variations, that the said decree be affirmed. Costs of re-hearing, as between solicitor and client, to be paid out of the testator's estate." Reg. Lib. A. 1807. fo. 1327.

July 3, 1809.

NEWLAND *v.* ATTORNEY-GENERAL and Others. (*a*)

Bequest of stock to government "in exoneration of the national debt."
Directed to be transferred to such person as the King, under his sign manual, shall appoint.

IN the will of *Abraham Newland*, dated *May* 2, 1799, was a bequest of stock "to His Majesty's government in exoneration of the national debt."

The Lord Chancellor directed it to be transferred to such person as the King, under his sign manual, should appoint.

Newland v. *Clark* and Others. On further directions, *July* 17, 1809. Ordered "as to" the several stocks therein mentioned, "and as to any interest or dividend which shall accrue due on the same, previous to the transfer hereafter to be directed, the same to be transferred and paid to such person or persons as his Majesty, by his sign manual, shall think fit to nominate for that purpose; and any person or persons who shall be so nominated is or are to be at liberty to apply," &c. as advised. Reg. Lib. B. 1808. fo. 1214.

(*a*) Ex relatione Mr. *Simpkinson.*

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HOLLAND (Infant) and Another PLAINTIFFS.
AND
HUGHES and WIFE - - - - DEFENDANTS. (*a*)

ROLLS.
May 10, 1809.

Testator in *India* bequeaths a sum of sicca rupees to his wife for life, with remainder to his children, and appoints his wife executrix, who invests the money on *Indian* securities, producing a large rate of interest, and afterwards comes to *England* with her only child, an infant.

On bill by the infant, held, that the widow is not compellable to refund the excess of interest received by her, beyond what the legacy would have produced if invested in the *English* funds, but ordered, the money to be remitted to *England*, and laid out in 3 *per cent.* annuities.

WILLIAM HOLLAND, of *Calcutta*, by his will, duly executed, &c., gave, devised, and bequeathed to *Rebecca*, his wife, 50,000 sicca rupees, for her life, to be raised out of the bulk of his property: and, after her, he gave the said principal money to be equally divided among his children by his said wife, who should survive her; and, for failure of children, to his said wife absolutely. And, after giving several other legacies, he gave, &c. all the residue of his estate, real and personal, to his wife for life, and after her death to his children, as before; and appointed his wife, and *Samuel Holland* (one of the plaintiffs) his executrix and executor, and guardians of his children.

The testator died, leaving his said wife, and only one child (the infant plaintiff) by his marriage with her. The wife alone proved the will in *India*, and collected the estate, and, after retaining the legacy of 50,000 sic. rup. (which she placed out at interest in *India*) and, after payment of the testator's debts, and the other legacies given by his will, invested the clear residue, amounting to 100,000 sic. rup. in *India* bonds, the interest of which, as well as of the 50,000 legacy, she received to her own use, and afterwards came to *England* with her child (the infant plaintiff) leaving her agent in *India* to collect and receive any outstanding

(*a*) Ex relatione Mr. *Shadwell*.

property

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property of the testator's there, and to remit the interest to her in *England*. The other plaintiff (who was the executor named in the will) proved in *England*, and instituted this suit, in the names of himself and the infant, against the widow (who had subsequently married again) and her husband, for an account and administration; to have the amount of the property ascertained, and all outstanding parts of it called in and remitted to *England*, and laid out and invested under the authority of the Court.

It appeared that the 50,000 sic. rup. legacy, and also the residue of the estate, so far as it was collected, had been invested on securities, yielding a rate of interest much more considerable than that afforded by the public funds of this country; and, upon the question being now raised, his Honour, the Master of the Rolls, was of opinion that the widow was not compellable to refund the excess of the interest which she had hitherto received, above that which would have been produced had the property been immediately invested in the English funds, but that the infant plaintiff, being in this country, had a right to have the property remitted, and invested in the 3 *per cents.*, in the name of the Accountant-General; which was ordered accordingly.

Order. The usual accounts to be taken, &c. The defendants to cause such part of the estate as remained in *India* to be remitted to *England*. The Master to ascertain how much of 3 *per cent.* consols the sum of 50,000 sic. rup. will purchase; the same to be purchased accordingly with a competent part of the estate remitted, and to be transferred into the name of the Accountant-

countant-General, in trust in the cause; the interest thereof to be paid to the defendants during the life of the defendant, *Rebecca*; with liberty to apply. Further directions reserved. Reg. Lib. 1808, A. fo. 968.

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HOLLAND v. HUGHES.

ATTORNEY-GENERAL v. NICHOL. (a)

July 15, 1809.

Injunction against obstructing ancient lights granted on affidavit, before appearance, and without notice; the plaintiff having also commenced an action previous to filing the bill.

INFORMATION and bill for injunction, to restrain defendant from proceeding in a building which obstructed the ancient lights of a house belonging to the Scottish corporation.

The relators had commenced an action at law, and now moved upon affidavit, for an injunction, before appearance, and without notice.

Injunction granted, till answer or further order; the Lord Chancellor being of opinion, that the action commenced made no difference; nor did he order the relators to discontinue their action, although they offered to do so, if necessary in order to entitle them to the injunction. (b)

(a) Ex relatione Mr. *Simpkinson*.

(b) The injunction was afterwards dissolved, on defendant undertaking, if the verdict at law should be against him, to remove the injury. *Attorney-General* v. *Nichol*, 16 Ves. 338.

In *The Attorney-General* v. *Bentham*, 1 Dick. 277. (See *Ryder* v. *Bentham*, 1 Ves. 543.) on a motion for an injunction to restrain the defendant from building so as to obstruct the lights of the relator's houses, it was ordered, by consent, that the parties should proceed to trial in an action to be brought against the defendant; and an injunction until after the trial. See, also, *The Attorney-General* v. *Doughty*, 2 Ves. 453. And *Chalk* v. *Wyatt*, the next case.

Appendix.

Aug. 10, 1810.

CHALK *v.* WYATT. (*a*)

Injunction before answer to prevent irreparable mischief, defendant having previously established his right at law.

HALL moved, upon certificate of bill filed, and affidavit, for an injunction to restrain the defendant from digging or removing any earth, stones, shingles, or beach, from or immediately under a bank belonging to the plaintiff, which protected his lands from the inundations and irruptions of the sea. The land was situated in the parish of *Minster*, in the island of *Sheppey*. It appeared that the defendant had, sometime since, removed some land or stones from this bank, whereupon the plaintiff brought an action of trespass against him; the defendant justified in the action, as lord of the manor: but the jury found a verdict with damages for the plaintiff. The affidavit further stated, that the defendant, nevertheless, had again begun to remove earth and stones from the bank; and that if he was permitted to continue so to do, the plaintiff's lands would be exposed to inevitable inundation, as this bank formed their only protection from the sea.

The LORD CHANCELLOR

Granted the application, in consideration of the irreparable injury the plaintiff was likely to sustain. He added, that he would not, however, have granted it, if the plaintiff had not previously established his right at law. (*b*)

" Injunction awarded to restrain defendant, his agents, servants, and workmen, and all other persons

(*a*) Ex relatione Mr. *Simpkinson.*

(*b*) See *The Attorney-General* v. *Nichol*, (the last case) and the references.

em-

employed or concerned for, or on the part of defendant from removing, &c. any further quantities of, &c. from off the said premises, or any part thereof, until answer or further order." Reg. Lib. A. 1809. fo. 794.

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CHALK *v.* WYATT.

ROLLS. *July* 14, 1810.

POPE *v.* WHITCOMBE. (*a*)

Word "Relations," in a will, means "next of kin." Bequest of residue to testator's wife for life, with a direction to dispose of the residue amongst relations in such manner as she should think fit. Appointment to relations, not being next of kin, void, and the residue decreed to be distributed amongst those who were next of kin to the testator at the time of *his* death.

JAMES CHILDE gave the residue of his estate and effects to his wife, *Mary Childe*, for life, with remainder to his son, *J. Childe*, absolutely, if he should attain twenty-one: but in case of his son's death before twenty-one, and without issue, then he gave certain legacies to some of his relations; and he directed his wife to dispose of the residue amongst his the testator's relations, in such manner as she should think fit.

The son died under twenty-one, and without issue, in the life-time of the testator.

After the testator's death, the wife appointed this residue to a natural son of one of the testator's nephews, and to other persons, who were related to the testator, but not his next of kin.

At the time of the testator's death, his next of kin were *John Childe*, his half-brother, and *Thomas* and *John Whitcombe*, the sons of a deceased sister. *Thomas* and *John Whitcombe* both died in the life-time of the wife.

At the hearing, the usual accounts were directed, and the Master was directed to enquire who were the testator's next of kin at the time of his death, and who,

(*a*) Ex relatione Mr. *Simpkinson.*

at

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at the time of the death of *Mary Childe*, and whether the appointees of *Mary Childe* were within any and what degree of relationship to the testator. The Master reported as above; and the cause came on this day upon further directions.

Hart and *Wyatt*, for *John Childe*, contended, that the wife could only appoint to the next of kin, and that, the appointment being bad *in toto*, *John Childe* was entitled to the whole, he being the only next of kin living at the death of the wife; and upon this last point they cited *Harding* v. *Glyn* (*a*), and *Cruwys* v. *Colman*. (*b*)

Simpkinson, for the representatives of *Thomas* and *John Whitcombe*, agreed, on the first point, and cited *Edge* v. *Salisbury* (*c*), and *Hands* v. *Hands*. (*d*) The Court always construes relations to mean next of kin, except in those cases where a power of selection is given; and there is no instance of the Court extending the rule, except when the testator gives the power of appointing to "such of his relations as it shall think fit," or uses other words to the same effect. Here no power of selection is given. Mrs. *Childe* had only the power of fixing the proportions in which the next of kin were to take. The residue, therefore, vested in those who were the testator's next of kin at the time of his death; though in uncertain proportions. (*e*) The cases cited in favour of the half-brother of the testator apply only where a

(*a*) 1 Atk. 469.

(*b*) 9 Ves. 319. See *Wright* v. *Atkyns*, 7 Ves. 255. 19 Ves. 299. 1 V. & B. 313. *Forbes* v. *Ball*, ante, p. 437.

(*c*) Amb. 78.

(*d*) 1 T. R. 437.

(*e*) *Hands* v. *Hands*, ub. sup. et vide *Rayner* v. *Mowbray*, 3 Bro. 234. *Masters* v. *Hooper*, 4 Bro. 207. *Doe* v. *Lawson*, 3 East, 278.

power

power of selection is given, and the person to whom that power is given dies without having exercised it; but here the interest vested.

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Pope v. Whitcombe.

Toller, for the appointees.

The Court was clearly of opinion with *Simpkinson*, and decreed accordingly. One moiety to go to *John Childe*, and the other to the representatives of *Thomas* and *John Whitcombe.*

Declare, That the will made by the testatrix, *Mary Childe*, is not a valid appointment of the residuary estate and effects of the testator.

[Reg. Lib. B. 1809. fo. 1535.]

GALLINI v. NOBLE.(a)

Rolls. *Aug.* 1, 1810.

Devise of real estates to be sold, and the produce applied in the same manner as the residue of the personal estate. Codicil, not executed so as to pass real estates, revoking the bequest of the residue, does not affect the will as to the real.

Bequest of "all the testator's *money* in the Bank of *England*," held to pass stock in the funds, testator having never had any *cash* in the Bank.

SIR *John Gallini* devises certain real estates to trustees to be sold, and directs the money to be produced by the sale, to be applied in the same manner as his residuary personal estate. He then gives certain legacies, and directs his residuary personal estate, and the money to arise from the sale of these real estates, to be applied in payment of his debts, and the residue amongst his children equally. By a codicil not duly executed according to the statute of frauds, he revokes the residuary bequest amongst his children, and gives the residue to his two daughters. It was attempted to

(a) Ex relatione Mr. *Simpkinson*.

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GALLINI *v.* NOBLE.

be argued for his heir at law, that the real estates resulted to him, as the testator had formed one fund of the produce of the real and personal estates.

But the Court held clearly, that the bequest of the personal estate only was revoked, and that the will was still in force with respect to the real estates.

Another point was made upon another part of the will. The testator bequeathed all his money in the Bank of *England* to his daughters. It appeared that he never had money in the Bank, but was entitled to some 3 *per cents.* and 5 *per cents.* Bank annuities.

The Court held, that the Bank annuities passed, though the testator had certainly expressed himself very inaccurately; and compared the case to that of an incorrect description of the intended legatee, and to the case where leaseholds have been held to pass under a devise of lands, there being no other property to answer the description.

Declare, That the will of the testator ought to be established, and the trusts thereof performed, so far as respects the real estate. And that the plaintiffs, by virtue of the bequest of all money in the Bank of *England* belonging to the testator, are entitled in equal moieties, to the sums of ——— 3 *per cent.* reduced annuities, and ——— 5 *per cent.* annuities, standing in the testator's name, in the books of the Governor and Company of the Bank of *England*. Defendant to transfer the same accordingly. Reg. Lib. A. 1809. fo. 1372.

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KING *v.* BURR.

Aug. 9, 1810.

Demurrer to bill of discovery in support of an action to recover the expenses of entertainments given by the plaintiff under an agreement with the defendant to introduce him to a woman of fortune, with a view to marriage, allowed.

THE bill stated that the defendant, being desirous of marrying some person of fortune, applied to the plaintiff to introduce him to a woman of that description; that the plaintiff agreed so to do; that he accordingly gave many sumptuous entertainments, to which he invited the defendant, together with various women of respectability and fortune; and that the defendant undertook to pay the expense of these entertainments. The bill also stated various letters from the defendant to the plaintiff, by which it appeared, that the defendant had it in his power to marry either of the women so introduced to him that he pleased to select. It then proceeded to state, further, that the plaintiff had commenced an action at law to recover the money expended in these entertainments, and prayed a discovery in support of such action. The defendant demurred generally.

The LORD CHANCELLOR,

Without hearing the counsel in support of the demurrer, allowed it, and said he would not give any assistance in support of such an action.

Demurrer to discovery allowed. Reg. Lib. A. 1809. fo. 828.

Appendix.

ROLLS.
July 4, 1811.

BRIDGES *v.* ROBINSON. (*a*)

Purchaser not to pay interest on the deposit, even where he has rendered a suit necessary by refusing to perform the contract on the ground of an objection to the title, which could not be supported.

A. CONTRACTED to sell to *B.* by auction. *B.* paid a deposit to the auctioneer, and then refused to complete, alleging that the title was bad. *A.* filed his bill, and it was found he had a good title, and *B.* was ordered to pay the residue of his purchase-money, with interest, from the day on which, by the terms of the contract, it ought to have been paid, together with the costs of the suit.

On petition, day after *Easter* Term, it was prayed, that the minutes be varied, by directing interest to be paid on the deposit, on the ground that, as *B.*'s conduct rendered a suit necessary, the deposit was locked up from *A.* during the suit.

Sir *Samuel Romilly*, and *Shadwell*, for the plaintiff.

Johnson for the defendant.

His HONOUR took time to consider, and, on the petition day after *Trinity* Term, 1811, gave judgment that *A.* was not entitled to interest on the deposit.

Afterwards, on motion by *Johnson*, on behalf of the defendant, it was ordered, that the minutes of the decree should be varied, and be as follows.

Decree, That the agreement in the pleadings mentioned be specifically performed, &c. Refer it back to the Master to compute interest on the remainder of the purchase-

(*a*) Ex relatione Mr. *Simpkinson*.

purchase-money (after deducting the deposit). The defendant to pay the sum of £——, (remainder of the purchase money, after deducting as aforesaid,) with interest at 4 *per cent.*, from the —— day of ———— (the day on which the purchase-money ought to have been paid according to the terms of the contract).

Reg. Lib. 1810. A. fo. 844.

BRODIE *v.* BARRY. (*a*)

March 26, 1811.

Receiver appointed, before answer, in a case of a devise to four trustees, of whom two declined to act; all parties being before the Court, and consenting.

THIS was the case of a devise to four persons, (defendants,) their heirs, executors, &c., of all the testator's freehold and leasehold estates, and all his works, stock in trade, &c., and all his personal estate and effects whatever, to hold, according to the nature of the estates respectively, upon the trusts in the will mentioned; and the testator appointed the same four persons his executors.

Two of the four only proved the will; but the bill charged that all the four (particularly those who had proved) possessed themselves of the personal estate, and entered into possession and receipt of the real estates; therefore praying (among other things) an account, and a sale of the real estates, or of so much as should not be necessary for carrying on the works in the bill mentioned; and the appointment of new trustees, in case of any of the four refusing to act, and in the mean time a receiver.

Upon a motion now made, to refer it to the Master, to appoint a proper person to be receiver, with the usual

(*a*) Ex relatione Mr. *Simpkinson*. See this case reported on other points, in 2 Ves. & Beam. 36. 127, &c.

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usual directions, it was alleged that all the defendants had appeared, but that no answers had yet been put in, and that the two defendants who had not proved, declined to act in the trusts of the will.

Sir *S. Romilly* and *Clason*, in support of the motion, referred to a late case of *Beaumont* v. *Beaumont* (*a*), in which it was stated to be settled, that the Court will, upon the application of all parties beneficially interested, appoint a receiver, when any of the trustees refuse to act.

Hart, for the defendants, (the acting trustees and executors);

Shadwell, for the defendants, (trustees named in the will, who declined to act); and

Johnson, for the other defendants, beneficially interested;

Severally consented to the prayer of this application.

The LORD CHANCELLOR, upon the authority of the case cited, made the order accordingly.

Ordered, That it be referred, &c., and that the defendants, (the acting trustees and executors,) or either of them, may be at liberty to propose themselves or

himself

(*a*) I have not been able to find this case in the Register's book, upon the point here mentioned. But see *Metcalfe* v. *Pulvertoft*, 1 Ves. & B. 180—183., where the Lord Chancellor says, "With respect to appointing a receiver before answer, the cases where the Court has refused, it turned upon this: that the party applying for the appointment could not state that he had, strictly speaking, an equitable title."

himself to be such receivers or receiver. The Master to approve of a reasonable salary to be allowed for the receivership, upon proper security, &c. Reg. Lib. A. 1810. fo. 485.

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BRODIE v. BARRY.

LLOYD v. PASSINGHAM.

1811. *July* 29.

Motion for a receiver, against the legal estate, upon evidence in a cause which had not been heard, refused.

IN this case a motion had been made by the plaintiffs for a receiver, supported by affidavits of certain facts alleged by the bill, which bill was demurred to as to so much as sought a discovery of the facts in question. The defendants being in possession under a legal title, the motion was refused, upon the ground that, although "cases of fraud, combined with danger "to the property, might arise, as to which a Court of "Equity would interfere upon affidavits," yet the Court always reluctantly interferes against the legal title, and only in a case of "fraud clearly proved, and of imminent danger if the intermediate possession should not be taken under the care of the Court." (*a*)

The motion was now renewed, upon the effect of the evidence that had been taken in the cause. (*b*)

The LORD CHANCELLOR. (*c*)

Do you, Mr. *Richards*, or does any gentleman at the bar, remember an instance of a motion for a receiver,

(*a*) Reported 16 Ves. 59., where the circumstances of the case are stated. And see *Maguire* v. *Allen*, 1 Ball & Beatty, 75, and references in the note, p. 76.

(*b*) See the effect of this evidence, Cooper, 152, 4., where the case is reported upon the hearing.

(*c*) Ex relatione Mr. *Rose*.

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LLOYD *v.* PASSINGHAM.

ceiver, upon the effect of the evidence in a cause, before hearing? I cannot entertain such an application without hearing the cause, as it would be a general mischief to grant it. I should have a hundred similar motions in the course of next term.

[Liberty was given to mention it again: but I do not hear that the application was ever renewed.]

1811. *July* 29.

The ATTORNEY-GENERAL *v.* BROOKE. (*a*)

A decree by default having been made absolute, the proper course to set it aside is by presenting a petition for a rehearing. A motion to discharge the order to make absolute, and for a day to shew cause, refused accordingly.

A DECREE having been pronounced upon default at the hearing, a motion was now made, on the part of defendant to discharge the order for making it absolute, and for a day to shew cause against the decree *nisi*, on payment of the costs occasioned by his default.

Leach and *Edwards*, in support of the motion, cited the case of *Vowles* v. *Young*. (*b*)

Sir *Samuel Romilly* and *Bell*, contrà.

The LORD CHANCELLOR,

Referring to *Cunningham* v. *Cunningham* (*c*), as reported by *Dickens* and *Kinsay* v. *Kinsay*, there cited(*d*), and to the case of *Hankwitz* v. *Ocarrel* (*e*), in the same book, said that he thought it would be more fit to rehear the decree, upon terms, than to discharge the former order; and accordingly directed that leave

(*a*) Ex relatione Mr. *Rose*. S. C.
(*b*) 9 Ves. 172.
(*c*) Ambl. 89. 1 Dick. 145.
(*d*) Cited 1 Dick. 145.
(*e*) 1 Dick. 109.

should

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should be given to present a petition for that purpose. (*a*)

Order. Defendant to be at liberty to present a petition to rehear the cause, upon such terms as should be just—the same to come on in the regular course with the cause petitions. Reg. Lib. 1810. A. fo. 920.

(*a*) A petition was afterwards presented accordingly. See *Attorney-General* v. *Brooke*, 18 Ves. 319.; where, however, the ground upon which the present application was refused is not correctly stated.

The Dowager Lady SUFFIELD, - PLAINTIFF;
AND
Lord SUFFIELD and Others, DEFENDANTS. (*a*)

ROLLS, *Feb.* 24, 1812.

Covenant by husband, in consideration of *l.*, (the purchase money of an estate of the wife,) within two years to convey lands in the county of *N.* of the value of such purchase-money, by way of settlement. The husband having died without performing the covenant, performance of the same decreed, against his representatives, by laying out in the purchase of land so to be settled a sum equal to the present value of estates in *N.*, which (at the time when the covenant ought to have been performed) would have been worth the amount of the purchase-money, with interest at 4 *per cent.* from the death of the covenantor.

BY indentures of lease and release, and fine, (24th and 25th *March*, 1766,) the late Lord *Suffield* and the present plaintiff (his Lady) settled the moiety of certain estates of Sir *Ralph Asheton*, deceased, of which the plaintiff was seised in fee, as one of his daughters and coheirs, to such uses as they (Lord and Lady *Suffield*) should jointly appoint; and (subject to such appointment) to the use of Lord *Suffield* (the husband) for life; remainder to his wife (the plaintiff) for life,

(*a*) Ex relatione Mr. *Shadwell.*

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with remainder to the children of the marriage in strict settlement.

By deed of appointment, (18th *June*, 1773,) Lord and Lady *Suffield* executed the power reserved to them by appointing a part of the said moiety to trustees for sale, and upon trust to pay the purchase-money to other trustees therein named for such uses as they (Lord and Lady *Suffield*) should jointly appoint; and, in default of appointment, to invest in other hands to be settled to the uses of the first mentioned indentures.

By another deed, (27th *May*, 1774,) Lord and Lady *Suffield*, in execution of the power last reserved to them, appointed the sums of 18,750*l*., and 1500*l*. (purchase-monies arisen from the sale) to themselves for their own use.

And by indenture, of the same date, Lord *Suffield* covenanted with trustees therein named, in consideration of Lady *Suffield* having joined him in that appointment, within two years from thenceforth, to convey, settle, and assure, an estate in fee, to be situate in the county of *Norfolk*, of the value of the said sums of 18,750*l*., and 1500*l*., to and upon the same uses as the estates, which were to have been otherwise purchased, would have been settled to and upon, in pursuance of the deed of the 18th of *June*, 1773.

Lord *Suffield* died in 1810, without having performed his covenant contained in the last-mentioned indenture; and the present plaintiff (his widow) filed her bill against his devisees and executors to have the benefit of that covenant.

Sir *S. Romilly*, and *Shadwell*, for the plaintiff.

Hart,

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Hart, *Bell*, and others, for the several defendants.

It was admitted, on the authority of a late case of *Lewes* v. *Popkin* (*a*), that the plaintiff was entitled to have as much money laid out in land, pursuant to the covenant, as would, at the present time, be the value of an estate in fee-simple in the county of *Norfolk*, worth, in 1776, the sums above-mentioned; and it was decreed accordingly.

Reg. Lib. 1811. B. fo. 1451. "Referred, to ascertain the present value of estates in the county of *Norfolk*, which were, in the year 1776, of the value of 18,750*l.* and 1500*l.*—Declare, the personal estate of *H.* late Lord *S.*, and (in case the same should not be sufficient) his real estate included in the 2000 years' term, (for payment of debts) liable to answer the same, with interest, at 4 *per cent.*, from the death of the said late Lord *S.*, in satisfaction of the covenant; and that plaintiff is entitled to such interest; the principal money to be laid out upon the trusts of the deed of the 27th of *May*, 1774."

(*a*) Before Lord Chancellor *Eldon*.

Appendix.

ROLLS. *Nov.* 19, 1812.

EMLY and Others (Assignees of BOROUGH, a Bankrupt,) *v.* GUY. (*a*)

A., tenant for life, with remainder to his children, redeems the land-tax on the estate with his own money, introducing into the contract for the redemption his own name, and that of another, as trustees for his children; and afterwards becomes bankrupt. On bill by his assignees against a purchaser of his life-estate, and of the land-tax so redeemed, a specific performance decreed, as being within the stat. 1 Jac. 1. c. 15. s. 5.

MICHAEL BOROUGH, a trader within the bankrupt laws, being seised for life of certain freehold premises, with remainder to his children, and having issue at the time three children, entered into a contract for the redemption of the land-tax, amounting to 57*l.*, upon the said premises, the certificate whereof was executed by the commissioners, who thereby certified that they had agreed with *Michael Borough* and *James Goddard*, (as trustees for the infant children of him the said *Michael Borough*,) for the redemption of such land-tax at the price of 2090*l.*, 3 *per cents.*, to be transferred to them (the commissioners) by instalments. It was stated by the bill, and admitted, that *Goddard* had no interest either as trustee or otherwise, in the premises, and that *Borough* procured both their names to be introduced into the certificate, as trustees, to make it appear that the land-tax was redeemed for the benefit of the children only. The certificate was duly registered, the transfer made, and the receipt indorsed; and it was further admitted that the stock so transferred belonged to *Borough* himself, and was exclusively his property.

Borough afterwards became bankrupt, and his assignees put up his life-estate in the premises to sale by auction, at which the defendant was declared highest bidder, and signed an agreement to complete the purchase, at 8000*l.*, according to the conditions; by one of which conditions it was expressed "that the purchaser was to pay, over and above the purchase-money "for

(*a*) Ex relatione Mr. *Shadwell.*

" for the land, the amount of the money paid for re-" deeming the land-tax, and that he would thereupon " become entitled to the amount of such land-tax as a " fee-farm rent charged on the estate, for ever, subject " to redemption, according to the form prescribed."

A bill was filed by the assignees for a specific performance; to which the defendant stated, by his answer, that he had no objection, if the Court should be of opinion that the plaintiffs were able to make a good legal title to the amount of the land-tax so charged and redeemable as aforesaid. The cause was heard upon bill and answer.

Sir S. *Romilly*, and *Shadwell*, for the plaintiff.

Richards, and *Wilson*, for the defendant,

Contended, that the assignees could not make a good title to the charge, not having the equitable interest in it; and that the case did not come within the statute.(*a*)

But the Court over-ruled the objection; and a specific performance was decreed. Reg Lib. A. 1812. fo. 61.

(*a*) I Jac. 1. c. 15. s. 5. providing that " a bankrupt conveying his lands or goods to any of his children, or others, without valuable consideration, the commissioners shall have power to assign by bargain and sale."

Appendix

Rolls.
June 29. 1813.

Specific performance decreed against a purchaser at a public auction, where the representation in the particulars of sale (complained of as calculated to mislead) was so vague and indefinite that it ought to have put the purchaser on making previous inquiry.

TROWER *v.* NEWCOME. (*a*)

THIS was a bill, by the vendor for specific performance of an agreement to purchase the advowson of *Honychurch*, in the county of *Devon*. The bill stated, (which was admitted by the answer,) that the plaintiff being seised in fee of the advowson in question caused the same to be set up to sale by auction, when the defendant became the purchaser, according to the conditions of sale. The printed particulars contained a description of the situation, number of acres, &c., and added " a voidance of this preferment is likely to occur soon," but made no mention of the present incumbent.

The defendant, by his answer, said he was induced to attend at the sale by the representation in the particulars above noticed; that the auctioneer, at the time of sale, said (in explanation) " that the living would be " void on the death of a person aged eighty-two," of which the defendant took a note in writing, or a copy of the particulars; and that he was, by such statement, induced to bid, and did bid accordingly; and was declared the purchaser, and signed the agreement. He then proceeded to state that he (the defendant) had, since the sale, discovered that the then present incumbent of the living was aged only thirty-two, upon which discovery, his (the defendant's) solicitor, sent back the abstract (which had been furnished) to the plaintiff's solicitor, with a note on the margin, stating the representation made at the time of sale, with these words added; " How does it become void?" to which the plaintiff's solicitors returned for answer, " We do not " consider the purchaser entitled to call for any security

(*a*) Ex relatione Mr. *Simpkinson*.

" for

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TROWER *v.* NEWCOME.

"for the voidance of the living, at the death of a person "aged eighty-two. No such security was required at "the sale, and the auctioneer only stated that such a "voidance would take place. We have no objection, "however, to the patron engaging by covenant or "bond, that the present incumbent will avoid the living "on the death of a gentleman aged eighty-two."

Upon this statement the defendant insisted, that the particulars of sale, and the representations made by the auctioneer, were untrue, and calculated to mislead, and that they did, in fact, mislead the defendant; and that he (the defendant) would not have bid for, or become the purchaser of, the advowson, if he had not given credit thereto; and that he, therefore, ought not to be compelled to complete the purchase.

It appeared in evidence that the incumbent of *Honychurch* expected to be presented to another living on the death of its incumbent, who was aged eighty-two, which would cause the voidance of *Honychurch*.

Hart, *Wetherell*, and *Simpkinson*, for the plaintiff.

Sir *S. Romilly*, and *Stephen*, contrà.

The MASTER *of the* ROLLS thought the representation made by the printed particulars so vague and indefinite that the Court could not take notice of it judicially, and that its only effect ought to have been to put the defendant upon making inquiries respecting the circumstances under which the alleged evidence was likely to take place, previous to his becoming the purchaser. That such a representation was capable of being supported by the fact, either of the incumbent being old, or infirm, or by various collateral circumstances.

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stances. *His Honour* compared this representation to that made in a case lately before him, respecting the purchase of a leasehold estate, which was stated in the particulars to be renewable "on the payment of a small fine;" leading to the question, "What is a small fine?" with reference to the circumstances of the property, and the expression being so vague that no importance whatever could be attached to it.(*a*)

Specific performance decreed. Reg. Lib. 1812. B. fo. 972.

(*a*) See *Stewart* v. *Alliston*, ante, Vol. I. p. 26.

WARD *v.* WARD.(*a*)

July 1, 1813.

The LORD CHANCELLOR.

The Court will change a next friend upon his not proceeding with a cause. Solicitor is not to attach without orders from his client. But, where the client is next friend of an infant, and moves to discharge the attachment on that ground, although otherwise regularly issued, it seems that the Court will refer it to the Master to see whether it is for the interest of the infant that the next friend should be continued.

THE Court will change the next friend of an infant, if he will not proceed in the cause; or it must be submitted to the Court, whether it is a proper cause to go on with. Certainly a solicitor ought not to attach without orders from his client; but if that client is next friend of an infant, and the solicitor regularly takes that step in course of process, and the next friend comes here (as in this instance he did) and moves to discharge it, it is a question, whether the better course is not to refer it to the Master, to see if it is fit, that the next friend should continue so any longer."

(*a*) Ex relatione Mr. *Rose*.

Appendix.

In the Matter of SLEWRINGE's CHARITY. (a)

EXCHEQUER.
July 16, 1814.

Under the act providing a summary remedy in cases of charity, after one order on petition, the subsequent orders may be obtained on motion.

A PETITION was presented in this matter under the act (52 *Geo.* 3. *c.* 101.) for the directions of the Court with reference to the application of the surplus rents of the charity estates, praying that the petitioners might be at liberty to lay a scheme before the master for that purpose with the other consequential directions. Before the hearing of the petition, a reference was accordingly made to the Master. And now this matter coming on upon motion to confirm the Master's report, the Court doubted whether, by the act, jurisdiction being given to the Court upon petition only in the first instance, the subsequent applications ought not also to be by petition. But upon *Simpkinson* citing *Ex parte a Friendly Society* (b), the Court made the order upon the authority of that case.

(a) Ex relatione Mr. *Simpkinson*. (b) 10 Ves. 287.

WALLWYN *v.* COUTTS. (a)

May 11, 1815.

Trust-deed for payment of creditors, no creditor being a party, nor made by agreement, and without consideration on the part of any creditor. The debtor afterwards executes other deeds, varying the trusts of the first. Motion for an injunction by a creditor under the first deed, who had filed a bill, to restrain the trustees from executing the trusts of the subsequent deeds till they had raised money to answer the first, refused.

THE Duke of *Marlborough* and Marquis of *Blandford* by deed created a trust for payment of their creditors, by conveying lands to Mr. *Blackstone* and

(a) Ex relatione Mr. *Shadwell*.

 Mr. *Coutts*,

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Mr. *Coutts*, specifying a particular order of payment. To this deed no creditor was a party, nor was it made by agreement with any creditor, nor was there any release, or other consideration, moving from any creditor. The Duke and Marquis afterwards executed other deeds, varying the trusts of the first deed. *Wallwyn*, a creditor under the first deed, filed his bill against the Duke and Marquis, and the trustees, to have his debts declared a lien on the estates, and for an injunction, to restrain the trustees from executing the subsequent trusts, till they had raised money sufficient to answer the first trusts, under which the plaintiff was interested. This injunction was moved for on the coming in of the answers. But the Chancellor, on hearing the motion only, without hearing the other side, refused it, on the ground that, the trust being voluntary, the Court would not enforce it against the Duke and Marquis, who might vary it as they pleased.

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